United Nations

Report
# of the Human Rights Committee

Volume II

Eighty-second session
(18 October-5 November 2004)
Eighty-third session
(14 March-1 April 2005)
Eighty-fourth session
(11-29 July 2005)

General Assembly
Official Records
Sixtieth session
Supplement No. 40 (A/60/40)

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Note

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VIEWS OF THE HUMAN RIGHTS COMMITTEE UNDER ARTICLE 5, PARAGRAPH 4, OF THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

A. Communication No. 823/1998, *Czernin v. The Czech Republic* (Views adopted on 29 March 2005, eighty-third session)*

Submitted by:	Mr. Rudolf Czernin (deceased on 22 June 2004) and his son Mr. Karl-Eugen Czernin (not represented by counsel)
Alleged victim:	The authors
State party:	The Czech Republic
Date of initial communication:	4 December 1996 (initial submission)
Subject matter:	Retention of citizenship
Procedural issues:	Non-exhaustion of domestic remedies
Substantive issues:	Equality before the law, non-discrimination, denial of justice
Articles of the Covenant:	14, paragraph 1; 26 and 2, paragraph 3
Articles of the Optional Protocol:	3 and 5, paragraph 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 29 March 2005,

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

An individual opinion signed by Committee member, Ms. Ruth Wedgwood is appended to the present document.

Having concluded its consideration of communication No. 823/1998, submitted to the Human Rights Committee on behalf of Rudolf Czernin under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The original author of the communication was Rudolf Czernin, a citizen of the Czech Republic born in 1924, permanently residing in Prague, Czech Republic. He was represented by his son, Karl-Eugen Czernin, born in 1956, permanently residing in Austria, and claimed to be a victim of a violation by the Czech Republic[1] of articles 14, paragraph 1 and 26 of the International Covenant on Civil and Political Rights (the Covenant). The author passed away on 22 June 2004. By letter of 16 December 2004, his son (hereafter referred to as second author) maintains the communication before the Committee. He is not represented by counsel.

Factual background

2.1 After the German occupation of the border area of Czechoslovakia in 1939, and the establishment of the "protectorate", Eugen and Josefa Czernin, the now deceased parents of the author, were automatically given German citizenship, under a German decree of 20 April 1939. After the Second World War, their property was confiscated on the ground that they were German nationals, under the Benes decrees Nos. 12/1945 and 108/1945. Furthermore, Benes decree No. 33/1945 of 2 August 1945 deprived them of their Czechoslovak citizenship, on the same ground. However, this decree allowed persons who satisfied certain requirements of faithfulness to the Czechoslovak Republic[2] to apply for retention of Czechoslovak citizenship.

2.2 On 13 November 1945, Eugen and Josefa Czernin applied for retention of Czechoslovak citizenship, in accordance with Presidential Decree No. 33/1945, and within the stipulated time frame. A "Committee of Inquiry" in the District National Committee of Jindřichův Hradec, which examined their application, found that Eugen Czernin had proven his "anti-Nazi attitude". The Committee then forwarded the application to the Ministry of the Interior for a final decision. In December 1945, after being released from prison where he was subjected to forced labour and interrogated by the Soviet secret services NKVD and GPÚ, he moved to Austria with his wife. The Ministry did not decide on their applications, nor did it reply to a letter sent by Eugen Czernin on 19 March 1946, urging the authorities to rule on his application. A note in each of their files from 1947 states that the application was to be regarded as irrelevant as the applicants had voluntarily left for Austria, and their files were closed.

2.3 After the regime change in Czechoslovakia in late 1989, the author, only son and heir of Eugen and Josefa Czernin, lodged a claim for restitution of their property under Act No. 87/1991 and Act No. 243/1992. According to him, the principal precondition for the restitution of his property is the Czechoslovak citizenship of his parents after the war.

2.4 On 19 January and 9 May 1995 respectively, the author applied for the resumption of proceedings relating to his father's and his mother's application for retention of Czechoslovak citizenship. In the case of Eugen Czernin, a reply dated 27 January 1995 from the Jindřichův Hradec District Office informed the author that the proceedings could not be resumed because the case had been definitely settled by Act 34/1953, conferring Czechoslovak citizenship on German nationals who had lost their Czechoslovak citizenship under Decree 33/1945 but who were domiciled in the Czechoslovak Republic.[3] In a letter dated 13 February 1995, the author insisted that a determination on his application for resumption of proceedings be made. In a communication dated 22 February 1995, he was notified that it was not possible to proceed with the citizenship case of a deceased person and that the case was regarded as closed. On 3 March 1995, the author applied to the Ministry of Interior for a decision to be taken on his case. After the Ministry informed him that his letter had not arrived, he sent the same application again on 13 October 1995. On 24 and 31 January 1996, the author again wrote to the Minister of Interior. Meanwhile, in a meeting between the second author and the Minister of Interior, the latter indicated that there were not only legal but also political and personal reasons for not deciding on the case, and that "in any other case but [his], such an application for determination of nationality would have been decided favourably within two days". The Minister also promised that he would convene an ad hoc committee composed of independent lawyers, which would consult with the author's lawyers, but this committee never met.

2.5 On 22 February 1996, the Minister of Interior wrote to the author stating that "the decision on [his] application was not favourable to [him]". On 8 March 1996, the author appealed the Minister's letter to the Ministry of Interior. In a reply from the Ministry dated 24 April 1996, the author was informed that the Minister's letter was not a decision within the meaning of section 47 of Act No. 71/1967 on administrative proceedings and that it was not possible to appeal against a non-existent decision. On the same day, the author appealed the letter of the Minister to the Supreme Court which on 16 July 1996 ruled that the letter was not a decision by an administrative body, that the absence of such a decision was an insurmountable procedural obstacle, and that domestic administrative law did not give the courts any power to intervene against any failure to act by an official body.

2.6 After yet another unsuccessful appeal to the Ministry of Interior, the author filed a complaint for denial of justice in the Constitutional Court which, by judgement of 25 September 1997, ordered the Ministry of Interior to cease its continuing inaction which violated the complainant's rights. Further to this decision, the author withdrew his communication before the Human Rights Committee.

2.7 According to the author, the Jindřichův Hradec District Office (District Office), by decision of 6 March 1998, reinterpreted the essence of the author's application and, arbitrarily characterized it as an application for *confirmation of citizenship*. The District Office denied the application on the ground that Eugen Czernin had not retained Czech citizenship after being deprived of it, in accordance with the Citizenship Act of 1993, which stipulates that a decision in favour of the plaintiff requires, as a prerequisite, the favourable conclusion of a citizenship procedure. The District Office did not process the author's initial application for resumption of proceedings on retention of citizenship. Further to this decision, the author resubmitted and updated his communication to the Committee in March 1998.

2.8 On 28 July 1998, the author informed the Committee that on 17 June 1998, the Ministry of Interior had confirmed the decision of the District Office of 6 March 1998. In August 1998, the author filed a motion for judicial review in the Prague High Court, as well as a complaint in the Constitutional Court. The latter was dismissed on 18 November 1998 for failure to exhaust available remedies, as the action was still pending in the Prague High Court.

2.9 On 29 September 1998, the author informed the Committee that on the same date, the District Office of Prague 1 had issued a negative decision on Josefa Czernin's application for retention of citizenship.

2.10 With regard to the requirement of exhaustion of domestic remedies, the author recalls that the application for retention of citizenship was filed in November 1945, and that efforts to have the proceedings completed were resumed in January 1995. He thus considers that they have been unreasonably prolonged. In the 1998 update of his communication, the author contends that the decision of the District Office is not a "decision on his application". He argues that remaining remedies are futile, as the District Office decided against the spirit of the decision of the Constitutional Court, and that a judgement by the Supreme Court could only overturn a decision from the District Office, without making a final determination. Thus, available remedies would only cause the author repeatedly to appeal decisions to fulfil only formal requirements, without ever obtaining a decision on the merits of his case.

2.11 The author states that the same matter is not being examined under another procedure of international investigation or settlement.

The complaint

3.1 The author alleges a violation of his right to equal protection of the law without discrimination and of his right to due process of law.

3.2 The author claims to be a victim of a violation of article 26 of the Covenant. He recalls that his parents and he himself were victims of a violation of their right to equal protection of the law without discrimination, through unequal application of the law and inequality inherent in the law itself, which does not allow him to bring an action for negligence against the authorities. Discrimination arises from the authorities' failure to issue a decision on their case, although their application fulfilled the formal and substantial requirements of Decree No. 33/1945. The author further argues that domestic law does not afford him a remedy against the inaction of the authorities, and that he is being deprived of an opportunity to enforce his rights. He claims that those who had their case decided have a remedy available, whereas he has no such remedy; this is said to amount to discrimination contrary to article 26.

3.3 The author claims to be a victim of a violation of article 14, paragraph 1, as the inaction of the authorities on his application for resumption of citizenship proceedings amounts to a failure to give him a "fair hearing by a competent, independent and impartial tribunal established by law", and that he is a victim of undue delay in the administrative proceedings.

The State party's submission on the admissibility and merits of the communication

4.1 On 3 February 1999, the State party commented on the admissibility of the communication and on 10 August 1999, it filed observations on the merits. It argues that the authors have not exhausted domestic remedies, and considers that their claims under articles 14, paragraph 1, and 26 are manifestly ill-founded.

4.2 The State party underlines that after the decision of the Constitutional Court of 25 September 1997 which upheld the author's claim and ordered the authorities to cease their continued inaction, the District Office in Jindřichův Hradec considered his case and issued a decision on 6 March 1998. The Ministry of Interior decided on his appeal on 17 June 1998. On 5 August 1998, the author appealed the decision of the Ministry to the Prague High Court. At the time of the State party's submission, these proceedings remained pending, and thus domestic remedies had not been exhausted. The State party argues that the exception to the rule of exhaustion of domestic remedies, i.e. unreasonable prolongation of remedies does not apply in the present case, since, given the dates of the above-mentioned decisions, and considering the complexity of the case and the necessary research, the application of domestic remedies has not been unreasonably prolonged. In addition, with regard to the effectiveness of these remedies, the State party argues that the author cannot forecast the outcome of his action, and that in practice, if a court concludes that the legal opinion of an administrative authority is incorrect, the impugned decision of the Ministry of Interior will be quashed. It underlines that under section 250j, paragraph 3, of the Czech Code of Civil Procedure, an administrative authority is bound by the legal opinion of the court.

4.3 The State party contends that the claim under article 26 of the Covenant is manifestly ill-founded, as the author did not substantiate his claim nor has presented any specific evidence or facts illustrating discriminatory treatment covered by any of the grounds enumerated in article 26. It further argues that the author did not invoke the prohibition of discrimination and equality of rights in the domestic courts, and therefore did not exhaust domestic remedies in this respect.

4.4 As to the alleged violation of article 14, paragraph 1, the State party admits that the allegation of breach of the right to a fair trial was meritorious at the time of the initial submission of the author. However, it argues that after the decision of the Constitutional Court of 25 September 1997, an administrative decision was issued by the District Office on 6 March 1998, which was in conformity with the judgement of the Constitutional Court, and that the author's right to a fair trial was fully protected through this decision. Referring to the dates of the above-mentioned decisions, the State party further asserts that there was no undue delay. The State party therefore considers that the claim under article 14, paragraph 1, of the communication is manifestly ill-founded. It lists a number of remedies available to the authors if undue delay is argued. The author could have filed a complaint with the Ministry of Interior, or with the President of the High Court. Another remedy available to him would have been a constitutional complaint. The State party indicates that a complaint must be replied to within two months following the date it is served on the government department competent to handle it. The State party recalls that the author did not avail himself of these remedies, and thus did not exhaust domestic remedies.

Further comments by the authors

5.1 On 19 November 1999, 25 June 2002, 29 January, 25 February, 16 and 22 December 2004, the authors commented on the State party's submissions and informed the Committee of the status of proceedings before the Czech courts. The author reiterates that the decision of the District Office of 6 March 1998 was taken to formally satisfy the requirements laid down by the Constitutional Court in its judgement of 25 September 1997. He argues that the authorities arbitrarily, and against his express will, reinterpreted his application for resumption of proceedings on retention of citizenship into an application for verification of citizenship, and treated it under the State party's current citizenship laws, rather than under Decree No. 33/1945 which should have been applied. The author claims that this decision was sustained by the appellate bodies without any further examination or reasoned decision. In his opinion, that an administrative agency arbitrarily and on its own initiative and without giving prior notice to the applicant, reinterpreted his application and failed to decide on the initial application, constitutes a violation of his right to due process and his right to proceedings and to a decision, protected by article 14.

5.2 In the case of the author's mother, the Prague Municipal Authority decided, on 6 January 1999, that "at the time of her death, Josefa Czernin was a citizen of the Czechoslovak Republic". The author points out that the authorities granted the application without problems in his mother's case, as opposed to his father's, and on substantially scarcer evidence. The author suggests that this inequality of treatment between his parents may be explained by the fact that his father owned considerably more property than his mother, and that most of his father's property is State-owned today.

5.3 On 19 October 2000, the Prague High Court overturned the decision of the Ministry of Interior of 17 June 1998 and determined that the case should be decided by reference to Decree 33/1945, that the impugned decision was illegal, that it defied the legally binding judgement of the Constitutional Court, and had violated essential procedural rules.

5.4 The case was then returned to the Ministry of Interior for a second hearing. On 31 May 2002, the Ministry held that Eugen Czernin, member of the German ethnic group, had failed to furnish sufficient "exculpatory grounds" in accordance with Decree 33/1945 and that "therefore, he lost Czechoslovak citizenship". The author appealed against this decision, which was confirmed by the Minister of Interior on 1 January 2003. He then filed an appeal in the Prague Town Court, which quashed this decision on 5 May 2004. It ruled that the Minister, in his decision of 1 January 2003, as well as the Ministry, in its decision of 31 May 2002, had issued these decisions "without the necessary argumentation", arbitrarily, and had ignored evidence provided by the author's father. The case, which was then returned for a third hearing by the Ministry of Interior, is currently pending before this organ.

5.5 In each of his further submissions, the author confirms that the authorities, which oblige him to go through the same stages of appeal again and again, theoretically *ad infinitum*, are unwilling to process his case and purposively drag out proceedings. He invokes the "undue prolongation" qualifier in article 5, paragraph 2 (b), of the Optional Protocol.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for purposes of article 5, paragraph 2 (a), of the Optional Protocol.

6.3 With respect to the requirement of exhaustion of domestic remedies, the Committee notes that the State party has challenged the admissibility of the communication in general terms. It also notes that the case of the author is currently pending before the Ministry of Interior, and that since the judgement of the Constitutional Court of September 1997 ordering the Ministry to cease its continuing inaction, the Ministry has heard the case of the author twice over a four year period. The two decisions issued by the Ministry of Interior in this case were quashed by the Prague High Court and the Prague Town Court, respectively, and referred back to the same Ministry for a rehearing. In the opinion of the Committee, and having regard to the absence of compliance of the Ministry of the Interior with the relevant decisions of the judiciary, the hearing of the author's case by the same organ for the third time would not offer him a reasonable chance of obtaining effective redress and therefore would not constitute an effective remedy which the author would have to exhaust for the purposes of article 5, paragraph 2 (b), of the Optional Protocol.

6.4 The Committee further considers that the proceedings instituted by the second author and his late father have been considerably protracted, spanning a period of 10 years, and thus may be considered to be "unreasonably prolonged" within the meaning of article 5, paragraph 2 (b), of the Optional Protocol. The Committee does not consider that the delays encountered are attributable to the second author or his late father.

6.5 As to the State party's claim that the authors failed to exhaust domestic remedies in relation to his claim of prohibited discrimination, the Committee recalls that the authors did not invoke the specific issue of discrimination before the Czech courts; accordingly, they have not exhausted domestic remedies in this respect. The Committee concludes that this part of the claim is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

6.6 With regard to the claim that the author was a victim of unequal application of the law in violation of article 26, the Committee considers that this claim may raise issues on the merits.

6.7 Regarding the authors' claim that they are victims of a violation of their right to a fair hearing under article 14, paragraph 1, the Committee notes that the authors do not contest the proceedings before the courts, but the non-implementation of the courts' decisions by administrative authorities. The Committee recalls that the notion of "rights and obligations in a suit at law" in article 14, paragraph 1, applies to disputes related to the right to property. It considers that the author has sufficiently substantiated his claim, for the purposes of admissibility, that the way in which the Czech administrative authorities reinterpreted his application and the laws to be applied to it, the delay in reaching a final decision, and the authorities' failure to implement the judicial decisions may raise issues under article 14, paragraph 1, in conjunction with article 2, paragraph 3. The Committee decides that this claim should be examined on its merits.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

7.2 The main issue before the Committee is whether the administrative authorities (the District Office in Jindřichův Hradec and the Ministry of Interior) acted in a way that violated the authors' right, under article 14, paragraph 1, to a fair hearing by a competent, independent and impartial tribunal, in conjunction with the right to effective remedy as provided under article 2, paragraph 3.

7.3 The Committee notes the statement of the authors that the District Office and Ministry of Interior, in their decisions of 6 March and 17 June 1998, arbitrarily reinterpreted his application on resumption of proceedings on retention of citizenship and applied the State party's current citizenship laws rather than Decree No. 33/1945, on which the initial application had been based. The Committee further notes that the latter decision was quashed by the Prague High Court and yet referred back for a rehearing. In its second assessment of the case, the Ministry of Interior applied Decree No. 33/1945, and denied the application.

7.4 The Committee recalls its jurisprudence that the interpretation and application of domestic law is essentially a matter for the courts and authorities of the State party concerned. However, in the pursuit of a claim under domestic law, the individual must have access to effective remedies, which implies that the administrative authorities must act in conformity with the binding decisions of national courts, as admitted by the State party itself. The Committee notes that the decision of the Ministry of Interior of 31 May 2002, as well as its confirmation by the Minister on 1 January 2003, were both quashed by the Prague Town Court on 5 May 2004. According to the authors, the Town Court ruled that the authorities had taken these decisions without the required reasoning and arbitrarily, and that they had ignored substantive evidence provided by the applicants, including the author's father, Eugen Czernin. The Committee notes that the State party has not contested this part of the authors' account.

7.5 The Committee further notes that since the authors' application for resumption of proceedings in 1995, they have repeatedly been confronted with the frustration arising from the administrative authorities' refusal to implement the relevant decisions of the courts. The Committee considers that the inaction of the administrative authorities and the excessive delays in implementing the relevant courts' decisions are in violation of article 14, paragraph 1, in conjunction with article 2, paragraph 3, which provides for the right to an effective remedy.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of article 14, paragraph 1, of the Covenant. With regard to the above finding, the Committee considers that it not necessary to examine the claim under article 26 of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including the requirement that its administrative authorities act in conformity with the decisions of the courts.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not, and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] The Covenant was ratified by Czechoslovakia in December 1975 and the Optional Protocol in March 1991. The Czech and Slovak Federal Republic ceased to exist on 31 December 1992. On 22 February 1993, the Czech Republic notified its succession to the Covenant and the Optional Protocol.

[2] Decree 33/1945, paragraph 2 (1) stipulates that persons "who can prove that they remained true to the Republic of Czechoslovakia, never committed any acts against the Czech and Slovak peoples and were actively involved in the struggle for its liberation or suffered under the National Socialist or Fascist terror shall retain Czechoslovak citizenship."

[3] Act 34/1953 of 24 April 1953 "Whereby certain persons acquire Czech citizenship rights", paragraph 1 (1) stipulates that "Persons of German nationality, who lost Czechoslovak citizenship rights under Decree 33/1945 and have on the day on which this law comes into effect domicile in the territory of the Czechoslovak Republic shall become Czech citizens, unless they have already acquired Czech citizenship rights".

APPENDIX

Individual opinion of Committee member Ms. Ruth Wedgwood

Eastern Europe has enjoyed democracy for more than a decade. Over that period, the Human Rights Committee has been presented with a number of cases, asking whether refugees from a former communist regime are entitled to the restoration of their confiscated properties, and if so, under what conditions.

In four Views concerning the Czech Republic, the Committee has concluded that the right to private property, as such, is not protected under the Covenant on Civil and Political Rights, but that conditions for the restoration of property cannot be unfairly discriminatory.

In the first case of this series, *Simunek v. The Czech Republic*, No. 516/1992, the Committee invoked the norm of "equal protection of the law" as recognized under article 26 of the Covenant. The Committee held that a state cannot impose arbitrary conditions for the restitution of confiscated property. In particular, the Committee held that restoration of private property must be available even to persons who no longer enjoy national citizenship and are no longer permanent residents - at least when the state party, under its prior communist regime, was "responsible for the departure" of the claimants. See Views of the Committee, No. 516/1992, paragraph 11.6.

The Committee has followed these views in subsequent cases, including *Adam v. The Czech Republic*, No. 586/1994; *Blazek et al. v. The Czech Republic*, No. 857/1999; and *Des Fours Walderode v. The Czech Republic*, No. 747/1997.

Committee member Nisuke Ando, writing individually in *Adam v. The Czech Republic*, No. 586/1994, properly pointed out that traditionally, private international law has permitted states to restrict the ownership of immovable properties to citizens. But a totalitarian regime that forces its political opponents to flee, presents special circumstances. And there is no showing that the Czech Republic has, in regard to new purchasers of real property, required either citizenship or permanent residence.

It is against this background that the Committee is brought to consider the case of *Czernin v. The Czech Republic*, No. 823/1998. Here, the Committee has challenged the state party not on the grounds of denial of equal treatment, but on a question of process - finding that the administrative authorities of the state party had "refuse[d] to carry out the relevant decisions of the courts" of the state party concerning property restoration.

The author's father, accompanied by his wife, left for Austria in December 1945, after interrogation in prison by the Soviet secret services NKVD and GPU. In 1989, after the fall of the communist regime in former Czechoslovakia, the author, as sole heir, sought restitution of his father's property, and in 1995, sought to renew his parents' applications for restoration of Czech citizenship. Since that time, the Czech Constitutional Court, the Prague High Court, and the Prague Town Court have, respectively, chastised the Czech Interior Ministry for failure to act upon the author's application, erroneous reliance on a 1993 citizenship law, and the absence of "necessary argumentation" concerning his father's asserted anti-Nazi posture (required for retention of Czech citizenship, under the post-war decree No. 33/1945 of Czech president Eduard Benes, in the case of ethnic Germans).

In one sense, this case is simpler than the previous cases, since the issue is process, rather than the limits of permissible substantive grounds. Nonetheless, one should note that the courts of the Czech Republic have, ultimately, sought to provide an effective remedy to the authors, in the consideration of their claims. Many democracies have seen administrative agencies that are reluctant to reach certain results, and the question is whether there is a remedy within the system for a subordinate agency's failure to impartially handle a claim. One could not adopt any per se rule that three rounds of appellate litigation amounts to proof that an applicant has been deprived of a right to a fair hearing by a competent, independent and impartial tribunal, especially since here the appellate courts have acted to restrain the administrative agency in question on its various grounds of denial of the author's claims. The Committee has not held that administrative proceedings fall within the full compass of article 14.

Equally, this case does not touch upon the post-war circumstances of the mandatory transfer of the Sudeten German population, a policy undertaken after the National Socialists' catastrophic misuse of the idea of German self-determination. Though population transfers, even as part of a peace settlement, would not be easily accepted under modern human rights law, the wreckage of post-war Europe brought a different conclusion. Nor has the author challenged, and the Committee does not question, the authority of the 1945 presidential decree, which required that ethnic Germans from the Sudetenland who wished to remain in Czechoslovakia, had to demonstrate their wartime opposition to Germany's fascist regime. A new democracy, with an emerging economy, may also face some practical difficulties in unravelling the violations of private ownership of property that lasted for 50 years. In all of these respects, the State party is bound to act with fidelity to the Covenant, yet the Committee must also act with a sense of its limits.

(*Signed*): Ruth Wedgwood

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

B. Communication No. 879/1998, *Howard v. Canada* (Views adopted on 26 July 2005, eighty-fourth session)*

Submitted by:	George Howard (represented by counsel, Peter Hutchins of Hutchins, Soroka & Dionne)
Alleged victim:	The author
State party:	Canada
Date of communication:	9 October 1998 (initial submission)
Subject matter:	Limitation of the author's right to fish and its impact on his right to enjoy his own culture, in community with other members of his group
Procedural issues:	Determination of the scope of the Committee's decision on admissibility
Substantive issues:	Right to enjoy one's own culture in community with others
Articles of the Covenant:	27
Articles of the Optional Protocol:	n.a.

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 26 July 2005,

Having concluded its consideration of communication No. 879/1999, submitted to the Human Rights Committee on behalf of George Howard under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication, dated 9 October 1998, is Mr. George Howard, born 5 June 1946, a member of the Hiawatha First Nation which is recognized under the law of the State party as an Aboriginal people of Canada. He claims to be a victim of a violation by Canada of his rights under articles 2, paragraph 2, and 27 of the Covenant. He is represented by counsel. The Optional Protocol entered into force for Canada on 19 August 1976.

The facts as presented

2.1 The author's Hiawatha community forms part of the Mississauga First Nations. These First Nations, among others, are parties to treaties concluded with the Crown, including a 1923 treaty ("the 1923 Williams Treaty") dealing, inter alia, with indigenous hunting and fishing rights. It provided, in return for compensation of $500,000, that the Mississauga First Nations "cede, release, surrender, and yield up" their interests in specific described lands, and further, "all the right, title interest, claim demand and privileges whatsoever of the said Indians in, to, upon or in respect of all other lands situated in the Province of Ontario to which they ever had, now have, or now claim to have any right, title, interest, demand or privileges, except such reserves as have been set apart for them by His Majesty the King."[1]

2.2 On 18 January 1985, the author took some fish from a river close to, but not on, his First Nation's reserve. He was fined after having been summarily convicted in the Ontario Provincial Court for unlawfully fishing out of season. The court rejected arguments of a constitutional right to fish based on the protection in section 35 of the Constitution Act 1982 concerning "existing aboriginal and treaty rights of the aboriginal peoples of Canada". It held that the author's First Nations ancestors had surrendered fishing rights in the 1923 treaties and that no such rights subsisted thereafter. On 9 March 1987, the Ontario District Court rejected the author's appeal.

2.3 On 13 March 1992, the Ontario Court of Appeal dismissed the author's appeal from the District Court, holding that the 1923 treaty had extinguished the fishing rights previously held by the author's First Nation, and that the First Nation's representatives had known and understood the treaty and its terms. On 12 May 1994, the Supreme Court rejected the author's further appeal, holding that by "clear terms" the First Nations surrendered any remaining special right to fish.

2.4 In 1990, the Canadian Supreme Court held in another case that "existing rights" within the meaning of section 35 of the Constitution Act were satisfied by evidence of continuity of the exercise of a right, even if scanty at times, unless there was evidence of a clear and plain intention by the Crown to extinguish the right.[2] Thereafter, the Ontario government committed itself to negotiate arrangements with indigenous people as soon as possible on the issue of hunting, fishing, gathering and trapping.

2.5 On 7 March 1995, the so-called "Community Harvest Conservation Agreements" (CHCAs) were signed by the Ontario Government and the Williams Treaties First Nations, allowing for the exercise of certain hunting and fishing rights. Under these agreements, which were renewable yearly, First Nations were permitted to hunt and fish outside the reserves, for subsistence, as well as for ceremonial and spiritual purposes, and barter in kind.

2.6 On 30 August 1995, the newly elected Ontario government exercised its right to terminate the CHCAs, wishing "to act in a manner consistent with" the Supreme Court's decision in the author's case.

2.7 In September 1995, the First Nations affected by the termination sought interim and permanent injunctions against the Ontario government. The Ontario Court of Justice rejected the claims, holding that the government had properly exercised its right, under the agreements, to terminate them with notice of 30 days. The author contends that the Court made it "very clear" that the outcome of further proceedings would go against the applicants, and that it was therefore pointless to pursue further costly remedies.

2.8 On 16 January 1997, the Supreme Court rejected the author's motion for a rehearing of his case. The author had argued that developments in the Supreme Court's jurisprudence to the effect that a clear intent to extinguish fishing rights had to accompany a surrender of interest in land in order to be valid[3] warranted a re-examination of his case.

The complaint

3.1 The author complains generally that he and all other members of his First Nation are being deprived of the ability to exercise their aboriginal fishing rights individually and in community with each other and that this threatens their cultural, spiritual and social survival. He contends that hunting, fishing, gathering and trapping are essential components of his culture, and that denial of the ability to exercise it imperils transmission of the culture to other persons and to later generations.

3.2 Specifically, the author considers that the Supreme Court judgement in his case is incompatible with article 27 of the Covenant. Referring to the Committee's general comment No. 23, he argues that the federal government of Canada failed in its duty to take positive measures of protection by not intervening in his favour in the judicial proceedings. Neither the Covenant nor other applicable international law were referred to or considered in the proceedings. The decision, moreover, has resulted in the denial of essential elements of culture, spiritual welfare, health, social survival and development, and education of children. The author argues that the Williams Treaties are the only treaties that fail to protect indigenous hunting and fishing rights, but instead aim at explicitly extinguishing them, and that the Supreme Court's decision in this case is an anomaly in its case law. Referring to the Committee's decision in *Kitok v. Sweden*,[4] the author argues that, far from being "necessary for the continued visibility and welfare of the minority as a whole", the restrictions in question imperil the very cultural and spiritual survival of the minority.

3.3 The author contends that the unilateral abrogation of the CHCAs violates article 27 of the Covenant. The author submits that article 27 imposes "an obligation to restore fundamental rights on which cultural and spiritual survival of a First Nations depends, to a sufficient degree to ensure the survival and the development of the First Nation's culture through the survival and development of the rights of its individual members". Although providing some relief, the contractual nature of the CHCAs, and the facility for unilateral termination, failed to provide adequate measures of protection for the author and the precarious culture of the minority of which he is a member.

3.4 The author also alleges violations of article 27 and article 2, paragraph 2, of the Covenant in that the federal and provincial governments are only prepared to consider monetary compensation for loss of the aboriginal rights, rather than restore the rights themselves. Payment of money is not an appropriate "positive measure" of protection, deemed to be required by article 2, paragraph 2.

3.5 The author adds that his claim as described above should be interpreted in the light of article 1, paragraph 2, of the Covenant, as the status of First Nations as "peoples" has been recognized at the domestic level. He contends that article 5, paragraph 2, of the Covenant precludes the State party from contending that First Nations do not, in international law, have such status, for it has been conferred on them by domestic law.

3.6 As a consequence of the above, the author requests the Committee to urge the State party to take effective steps to implement the appropriate measures to recognize and ensure the exercise of their hunting, fishing, trapping and gathering rights, through a new treaty process.

3.7 The author states that the same matter has not been submitted for examination under any other procedure of international investigation or settlement.

Videotape submission by the author

4. In his original communication of 9 October 1998, the author, referring to the oral tradition of the Mississauga First Nations, requested the Committee to take into account, in addition to written materials submitted by the parties, oral evidence reproduced in the form of a videotape containing an interview with the author and two other members of the Mississauga First Nations on the importance of fishing for their identity, culture and way of life. On 12 January 2000 the Committee, acting through its Special Rapporteur on new communications, decided not to accept videotape evidence, with reference to the Optional Protocol's provision for a written procedure only (article 5, paragraph 1, of the Optional Protocol). By letter dated 7 February 2000, the author furnished the Committee with a transcript of the videotaped testimony in question. The Committee expresses its appreciation for the author's willingness to assist the Committee by submitting the transcript.

The State party's submissions on the admissibility of the communication

5.1 By submission of 28 July 2000, the State party argues that the communication is inadmissible for failure to exhaust domestic remedies. The State party points out that current laws regulate, but do not prohibit, hunting and fishing activities. The regulations, dealing with licensing requirements, catch and hunting limits, and seasonal restrictions, are intended to advance objectives of conservation, safety and ethical hunting practices. The author, as anyone else, is able to exercise his traditional practices within these confines.

5.2 The State party observes that the Williams Treaties First Nations have an action currently pending in the Federal Court, alleging a breach of fiduciary duty by the federal and Ontario governments. They seek, inter alia, a remedy that would restore their hunting and fishing rights outside the reserves. The parties have currently stayed this action by agreement, while negotiations are continuing.

5.3 The State party further observes that the Williams Treaties First Nations did not avail themselves of the possibilities to challenge the termination of the CHCAs. While the initial action was dismissed on grounds of procedural defect, the Court made clear that it was open to them to bring a fresh application. They did not do so. The State party notes that, while the author contends that to do so would have been "pointless", it has been the Committee's constant approach that doubts about the effectiveness of remedies is not sufficient reason not to exhaust them.

5.4 Thirdly, the State party observes that it would be open to the Williams Treaties First Nations to seek the assistance of the independent advisory Indian Claims Commission in resolving a dispute in their claims negotiations with the federal government. This settlement procedure has not been exercised.

The author's comments

6.1 By submission of 21 December 2000, the author rejects the State party's observations, arguing that domestic remedies have been exhausted, for the Supreme Court's binding decision in his case confirmed the extinguishment of his aboriginal rights.

6.2 The author argues that the current proceedings before the Federal Court raise different issues and cannot grant him the remedy he seeks. The current proceedings concern breach of fiduciary duty, rather than the restoration of aboriginal harvesting rights, and seek (in current form) a corresponding declaration with "a remedy in fulfilment of the Defendant Crown's obligation to set aside reserves, or damages in lieu thereof". In any event, the Federal Court is bound to follow the Supreme Court's decision to the extent that it held that the aboriginal rights in question had been extinguished by the Williams Treaties. The author notes that while the Federal Court proceedings may allow his community to acquire additional lands and fair compensation for the 1923 surrender, they will not restore his harvesting rights, since the Supreme Court's decision has held they were extinguished at that time.

6.3 As to the proceedings to challenge the abrogation of the CHCAs, the author argues that the outcome of further proceedings was "clearly predictable". The judge stated that he had "determined that on the factual merits there is no support for the granting of any declaratory or injunctive relief". Referring to the Committee's jurisprudence,[5] the author notes that the Supreme Court in his case had already "substantially decided the same question in issue" and that therefore there was no need for recourse to further litigation. Moreover, the Supreme Court had denied his own application to revisit its decision in his case, which therefore remained binding on the lower courts.

6.4 To the extent that the State party suggests that negotiations should be pursued, the author argues that these are not "remedies" in terms of the Optional Protocol, and, in any event, that the State party has not shown they would effectively restore the harvesting rights. On 16 May 2000, the First Nations were informed that negotiations would not resume without the presence of the Ontario government as a party. Moreover, the Indian Claims Commission is an advisory body whose recommendations are not binding upon the federal government. Additionally, the Commission may only facilitate certain categories of dispute, and the federal government has already characterized the issue of restoration of harvesting rights as falling outside those categories.

Subsequent submissions of the parties

7.1 By submission of 12 July 2001, the State party responded to the author's comments, arguing that while the author claims not to be acting as a representative of the Williams Treaties, but on his own behalf, he is in fact clearly acting on their behalf[6] and requesting a collective remedy.

7.2 In terms of current Federal Court proceedings, the State party argues that it is highly relevant that the First Nations are seeking a remedy for breach of fiduciary duty arising from the surrender of their aboriginal rights, including hunting and fishing rights. While they currently seek compensation, they sought a remedy of restoration at an earlier point and of their own accord modified those pleadings to omit this aspect of remedy. The State party points out that it would be open to seek a remedy of restoration of hunting and fishing rights in the appropriate provincial jurisdiction. Indeed, the First Nations have initiated an action in the Ontario Superior Court of Justice.

7.3 The State party points out that the Supreme Court's decision in the author's case was essentially limited to the factual question of whether he had an existing right to fish in the area where he was caught fishing and charged. It did not address questions of breach of fiduciary duties, and remedies available for such a breach, and accordingly these questions remain open before the courts.

7.4 On 5 September 2001, the author further responded, arguing that he satisfies all conditions of admissibility: in particular, he is a victim within the meaning of article 1 of the Optional Protocol, being denied the ability by highest judicial decision to practice fishing as a member of a "minority" within the meaning of article 27. Referring to previous cases decided by the Committee,[7] he argues that it is of no relevance that a remedy he might obtain under the Optional Protocol might benefit others in his community. He alleges specific violations of his rights under the Covenant. Finally, he has exhausted all legal remedies open to him. He submits that it would be unjust to be deprived of his right to present an individual petition based on the Covenant to the Committee simply because his First Nation is pursuing other remedies before Canadian courts under domestic law, along with other First Nation parties to the Williams Treaties.

7.5 The author argues that, under the current state of Canadian law, it is not possible for courts to restore extinguished aboriginal rights.[8] All the courts, including the Supreme Court of Canada, are bound by the constitutional recognition in 1982 of "existing" aboriginal rights only. He contends that it is irrelevant that the Supreme Court in his case did not address the fiduciary breach question - even if it had, the outcome would have remained unaltered. Similarly, in terms of further action on the abrogation of the CHCAs, the courts would have been bound by the Supreme Court's determination that no aboriginal right existed in the author's case.

7.6 On 15 January 2003, the State party made further submissions, disputing that the current state of its law makes restoration of extinguished rights impossible. The State party points out that in the Supreme Court decision cited to this effect, the Court did not rule on what, if any, would be the Crown's fiduciary obligations to the First Nation in the process of surrender/extinguishment of the First Nation's rights, whether there had been a breach of any such obligations, and, if so, what remedies might be available. However, precisely these issues are either raised in the proceedings pending in the Federal Court by the Williams Treaties First Nations, or could be raised in the action before the Ontario Superior Court of Justice.

7.7 The State party further states that the federal government has not refused to negotiate hunting, fishing, trapping and gathering rights with the Williams Treaties First Nations. The federal government however considers that the restoration of such rights would require the participation of the Ontario State government, as Ontario alone possesses constitutional jurisdiction over provincial Crown lands and the right to pursue harvesting thereon. The Ontario government is reviewing the First Nations' claims and has not yet made a determination as to whether to accept the claim for negotiations.

The Committee's decision on admissibility

8.1 At its seventy-seventh session, the Committee considered the admissibility of the communication.

8.2 The Committee ascertained that the same matter was not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a), of the Optional Protocol.

8.3 As to the State party's argument that the author is acting on behalf of third parties, the Committee noted that the author claimed personally to be a victim, within the meaning of article 1 of the Optional Protocol, of an alleged violation of his rights under the Covenant, by virtue of the Supreme Court's decision affirming his conviction for unlawful fishing. As to the position of further individuals, the Committee recalled its jurisprudence that there is, in principle, no objection to a group of individuals, who claim to be similarly affected, collectively to submit a communication about alleged breaches of their rights.[9] In the present case, however, to the extent that the communication could be understood to have been brought on behalf of other individuals or groups of individuals, the Committee noted that the author had provided neither authorization by such persons nor any arguments to the effect that he would be in the position to represent before the Committee other persons without their authorization. Consequently, the Committee found the communication inadmissible under article 1 of the Optional Protocol, to the extent it could be understood to have been submitted on behalf of other persons than the author personally.

8.4 Concerning the State party's arguments that on-going negotiations might provide an effective remedy, the Committee referred to its jurisprudence that remedies that must be exhausted for the purposes of the Optional Protocol are, primarily, judicial remedies. Negotiations proceeding on the basis of, inter alia, extralegal considerations including political factors cannot generally be regarded as being of analogous nature to these remedies. Even if such negotiations were to be regarded as an additional effective remedy to be exhausted in specific circumstances,[10] the Committee recalled, with reference to article 50 of the Covenant, that the State party is responsible, in terms of the Covenant, for the acts of provincial authorities as much as federal authorities. In the light of the absence of a decision, to date, by the provincial authorities, on whether to accept the First Nations' claim for negotiations, the Committee would in any event regard this remedy as being unreasonably prolonged. Accordingly, on the current state of negotiations, the Committee did not, on either view, regard its competence to consider the communication excluded by virtue of article 5, paragraph 2 (b), of the Optional Protocol.

8.5 The same applied in relation to the argument that actions are pending in the Federal Court and in the Ontario Superior Court of Justice. Besides the fact that these actions were brought by First Nations parties rather than the author and that their outcome would have no bearing on the author's conviction in 1985 for unlawful fishing, the Committee considered that insofar as the author might individually benefit from such a remedy, the remedy was unreasonably prolonged in relation to him. The Committee was therefore satisfied that the author, in pursuing his own case through to the Supreme Court, exhausted domestic remedies in respect of the claimed aboriginal rights to fish, which are an integral part of his culture.

8.6 On 1 April 2003, the Committee therefore decided that the communication was admissible to the extent that the author was being deprived, under the sanction of criminal law, of the ability to exercise, individually and in community with other members of his aboriginal community, his aboriginal fishing rights which are an integral part of his culture.

The Committee's consideration of the merits of the communication

State party's submission on the merits

9.1 By submission of 23 March 2004, the State party comments on the merits of the communication. Contesting the author's claims of violations of articles 2 (2) and 27 of the Covenant in his case, the State party submits that the author is able to enjoy, individually and in community with the other members of the Hiawatha First Nation, the aspects of his culture related to fishing.

9.2 The State party recalls that in the 1923 Williams Treaty, the author's First Nation agreed to give up its aboriginal rights to fish, except for a treaty right to fish in the reserves set aside for them. The Ontario Court has held that this treaty right to fish extends to the waters that are adjacent to the reserves and the Government has interpreted this to mean up to 100 yards from shore in waters fronting the reserve boundaries. In these waters the members of the Hiawatha First Nation do not have to comply with Ontario's normal fishing restrictions, such as closed seasons and catch limits and have a right to fish year-round for food, ceremonial and social purposes. In this context, the State party points out that neither the author nor the Hiawatha First Nation depends on fishing for their livelihood. It is said that the members of the Hiawatha First Nation (of whom 184 members live on the reserve and 232 outside) have tourism as their main source of income and that recreational fishing is a significant attraction for tourists to the area. The fish of Rice Lake, on the shores of which the Hiawatha First Nation lives, are said to be among the most abundant in the area.

9.3 The State party further states that in addition the author can obtain a recreational fishing license enabling him to fish in the lakes and rivers of the Kawartha Lakes region surrounding the Hiawatha First Nation reserve from May to November. The limited restrictions placed on the fishery are targeted and specific to particular fish species and are intended to ensure that the particular vulnerability of each species is duly considered, and that all persons using the resource, including the author and the other members of the Hiawatha First Nation, benefit there from. Limits are imposed on what species of fish may be caught, when each species may be caught and how many may be caught.[11] When the waters bordering the Hiawatha Reserve are closed from 16 November to late April for conservation purposes, the author can fish for most species in other lakes and rivers further away from January to March and from May to December.

9.4 The State party thus argues that, since the author is able to fish all year round, share his catch with his family and show his children and grandchildren how to fish, his right to enjoy the fishing rights belonging to his culture has not been denied to him. The State party submits that the author's assertion that there is not enough fish where he is allowed to fish cannot be reconciled with the fact that he can fish adjacent to the Hiawatha First Nation reserve in the Otonabee river, a short distance downstream from where he was fishing on 18 January 1985 and is also inconsistent with fishery surveys and with public statements made by the Hiawatha First Nation in order to attract tourists. Lawful fishing opportunities exist for the author also in the winter season when the waters next to the Hiawatha reserve are closed for fishing.

9.5 As to the author's argument that the Supreme Court's decision in his case is inconsistent with the State party's obligations under article 27 of the Covenant, the State party recalls the issues and arguments presented to the courts and their decisions. The author was charged for unlawfully fishing during a closed period, because he had taken some pickerel fish from the Otanabee river near but not on the Hiawatha First Nation reserve. At trial before the Provincial Court of Ontario, the author pleaded not guilty and argued that he had a right to fish as a member of the Hiawatha First Nation, that this right was not extinguished by the 1923 Williams Treaty and that this right should not be abrogated by the fishing regulations. The trial judge, having been provided with hundreds of pages of documentary evidence, concluded that the lands where the offence was alleged to have occurred were in fact ceded by the 1923 Treaty, and that any special rights as to fishing were included in that. On appeal in the District Court of Ontario, the judge found that he could not conclude that the Indians were mislead at the time of the 1923 Treaty, and that section 35 of the Constitution Act 1982, recognizing and confirming the existence of aboriginal treaty rights of the aboriginal people of Canada, did not create new rights or reconstitute the rights that had been contracted away. In the Ontario Court of Appeal, the central issue was whether the rights of the Hiawatha First Nation members to fish on the Otanabee river had been surrendered by the 1923 Williams Treaty. The author argued that the Treaty should not be interpreted so as to extinguish the rights, or alternatively that the Rice Lake Band (as the Hiawatha First Nation was then called) did not have sufficient knowledge and understanding of the Treaty's terms to bind the Band to it. The Court found that the language of the 1923 Treaty clearly and without ambiguity showed that the Band surrendered its fishing rights throughout Ontario when it entered into that Treaty and concluded that the Crown had satisfied its onus of establishing that the representatives of the Band knew and understood the treaty and its terms. On appeal to the Supreme Court, the central issue was whether the signatories to the 1923 Williams Treaty had surrendered their treaty right to fish. The Supreme Court after having carefully reviewed the lower courts' assessment of the evidence, endorsed their findings and concluded that the historical context did not provide any basis for concluding that the terms of the 1923 Treaty were ambiguous or that they would not have been understood by the Hiawatha signatories. In this context, the Court pointed out that the Hiawatha signatories were businessmen and a civil servant and that they all were literate and active participants of the economy and society of their province.

9.6 The State party argues that the author's attempt to undermine the courts' findings of fact goes against the Committee's principle that it is for the courts of the States parties and not for the Committee to evaluate facts and evidence in a particular case. The State party also takes issue with the author's suggestion that the Supreme Court's decision in his case reversed a long held understanding of the Hiawatha First Nation that after 1923 they maintained their aboriginal right to fish and were not subject to Ontario's fishing laws. According to the State party this proposition was not supported by any evidence during the court hearings and in fact, the evidence was to the contrary.

9.7 Finally, the State party argues that article 27 must allow for a minority to make a choice to agree to the limitation of its rights to pursue its traditional means of livelihood over a certain territory in exchange for other rights and benefits. This choice was made by the Hiawatha First Nation in 1923 and, in the State party's opinion, article 27 does not permit the author to undo his community's choice over 80 years later. The State party notes that the author did not raise any argument related to Canada's international obligations, including article 27 of the Covenant, during the court proceedings.

Author's comments on the State party's submission

10.1 On 30 August 2004, the author comments on the State party's submission and reiterates that the Williams Treaties are the only treaties in Canada which do not protect Aboriginal hunting, fishing, trapping and gathering rights, but rather are held to have explicitly extinguished these rights. As a consequence, the author claims that he does not enjoy the same special legal and constitutional status as all other Aboriginal peoples of Canada enjoying Aboriginal or treaty rights. The author considers that monetary compensation for these rights is no substitute for the necessary measures of protection of the minority's culture within the meaning of article 27 of the Covenant.

10.2 The author argues that as a member of a minority group, he is entitled to the protection of economic activities that comprise an essential element of his culture.[12] The exercise of cultural rights by members of indigenous communities is closely associated with territory and the use of its resources.[13] The author notes that the State party does not deny that fishing is an essential element of the culture of the minority to which he belongs, but rather focuses on its assertion that the author is in a position to exercise this right to fish. The author states, however, that the State party does not identify whether he is able to exercise his cultural right to fish as distinct from, and additional to, any statutory privileges to fish that are available to all persons, indigenous and non-indigenous, upon obtaining through payment a licence from the Government.

10.3 The author further challenges the State party's focus on fishing only and submits that this is based on an excessively narrow reading of the Committee's admissibility decision. According to the author, his communication also includes his rights to hunting, trapping and gathering since these are an equally integral part of his culture which is being denied.

10.4 The author emphasizes that it is the cultural and societal importance of the right to fish, hunt, trap and gather which are at the heart of his communication, not its economic aspect. The fact that the members of the Hiawatha First Nation participate in the general Canadian economy cannot and should not diminish the importance of their cultural and societal traditions and way of life.

10.5 Referring to the size of the Hiawatha First Nation reserve (790.4 hectares) and the reserve shared with two other First Nations (a number of islands), the author argues that it is unreasonable to suggest that he is able to meaningfully exercise together with members of his community his inherent rights to fish and hunt within the confines of the reserves and the waters immediately adjacent to them. These rights are meaningless without sufficient land over which to exercise them. In this context, the author reiterates that with the exception of the First Nations parties to the Williams Treaties, all other First Nations in Canada who have concluded treaties with the Crown have had their harvesting rights recognized far beyond the limits of their reserves - throughout their traditional territories.

10.6 As to the State party's argument that he can fish with a recreational licence, the author asserts that he is not a recreational fisher. In his opinion, the regulations governing recreational fishing are designed to enhance sports fishing and make clear that all fishing is done as a privilege and not a right. The general rule is prohibition of fishing activities, except as provided for in the regulations and pursuant to a licence. The regulations make exceptions to the general rule for persons in possession of a licence issued under the Aboriginal Communal Fishing Licence Regulations, but the author states that he has been denied the benefit of this provision because of the Court's decision that his aboriginal rights had been extinguished by the Williams Treaty.

10.7 The author observes that by equating his fishing activities with those of a recreational fisher, the State party deems his access to fishing a privilege not a right. His fishing activities are thus not granted priority over the activities of sport fishers and can be unilaterally curtailed by the State without any obligation to consult the author or the leaders of his First Nation. According to the author, this treatment is contrary to that afforded to other aboriginal persons in Canada for whom the Constitution Act 1982 provides that aboriginal and treaty rights have priority over all other uses except for conservation.

10.8 The author argues that the State party has an obligation to take positive measures to protect his fishing and hunting rights, and that to allow him to fish under recreational regulations is not a positive measure of protection required by article 2 (2) of the Covenant.

10.9 He further submits that he is prohibited from fishing in the traditional territory of the Hiawatha First Nation from 16 November to late April every year. According to the author, the State party's argument that he can fish in lakes and rivers further away from the Hiawatha reserve fails to take into account the concepts of aboriginal territory as these lakes are not within the traditional territory of the Hiawatha First Nation. The author further argues that the Regulations give priority to fishing by way of angling and that traditional fishing methods (gill netting, spearing, bait-fish traps, seines, dip-nets etc) are restricted. As a result, many of the fish traditionally caught by Mississauga people cannot be fished by traditional netting and trapping methods. The author also mentions that he cannot ice-fish in the traditional grounds of his First Nation. He refers to a judgement of the Supreme Court (*R. v. Sparrow*, 1990) where the court directed that prohibiting aboriginal peoples from exercising their aboriginal rights by traditional methods constitutes an infringement of those rights, since it is impossible to distinguish clearly between the right to fish and the method of fishing. Finally, the author argues that the catch limits imposed by the Regulations effectively restrict him to fishing for personal consumption only.

10.10 For the above reasons, the author maintains that his rights under article 27 and 2 (2) of the Covenant have been violated and requests the Committee to urge the State party to take effective steps to implement the necessary measures to recognize and ensure the exercise of constitutionally protected hunting, fishing, trapping and gathering rights through a treaty process.

Further submissions of the parties[14]

11.1 By submission of 15 December 2004, the State party takes issue with the author's assertion that the scope of the Committee's admissibility decision includes hunting, trapping and gathering rights. It states that the text of the admissibility decision is clear and that the issue before the Committee only concerns "fishing rights which are integral to" the author's culture. If the author does not agree to this limitation, he is free to request the Committee to review its decision on admissibility, in which case the State party reserves its right to make further submissions on this issue.

11.2 The State party also submits that the 1923 Williams Treaty was negotiated upon request by the First Nations themselves, who were looking for recognition of their claims to rights in the traditional hunting territories in Ontario lying north of the 45th parallel. After inquiring into the claims, treaties were concluded by which the First Nations gave up their rights over the territories in Ontario in exchange for compensation. The Rice Lake Band was familiar with the treaty process and as examined by the Court of Appeal in the author's case, the minutes of the meeting of the Band in Council show that the draft treaty was read, interpreted and explained before it was unanimously approved.

11.3 As to the author's claims with respect to the restrictions on what species he can fish, and by what method, the State party argues that these claims under article 27 should have been raised before. The State party notes in this respect that the author's original communication focused on the seasonal restrictions of his ability to fish and raised further arguments concerning his ability to transmit his knowledge to his children, participate with his community and fish for subsistence. He raised no claims in respect to being prevented from fishing for traditional fish or with traditional methods and the State party has thus not been requested to make submissions in respect of the admissibility and merits of these claims. The State party further notes that the evidence presented by the author in respect to these claims is very general and not specific to the Hiawatha First Nation, calling into question its reliability. For these reasons, the State party requests the Committee not to address these claims.

11.4 With regard to the author's assertion that the State party has an obligation to take positive measures to protect his fishing rights and that it has failed to do so, the State party submits that the author has a constitutionally protected treaty right to fish within his Nations' reserve and the waters adjacent to it. In the reserve that the author's First Nation shares with the Mississaugas of Curve Lake and of Scugog Island (Trent Reserve No. 36A) the author's treaty right to fish is also protected. The State party points out that the shared reserve is made up of over 100 islands spread throughout 12 lakes and rivers in the Kawarthas and that the waters adjacent to these islands provide significant fishing opportunities to the author and members of the Hiawatha First Nation. In these waters, the author may fish at any time of the year, using his community's traditional techniques. The State party submits that the above constitutional protection does constitute a positive measure.

11.5 The State party further explains that under the major land cession treaties of Canada, including the Williams Treaties, what were once aboriginal rights to hunt and fish were redefined and reshaped through the treaties. The terms of the treaties varied depending on the purpose of the treaty and the circumstances of the parties. According to the State party, treaties in remote areas with sparse population and little urban development protect the pursuit of fish and wildlife for subsistence as appropriate in the context. The Williams Treaties concerned however lands in close proximity of urbanization and protection of these rights for subsistence were not an issue.

11.6 As to the author's argument that a recreational fishing licence is a mere privilege and not a right, the State party observes that article 27 does not require that a cultural activity be protected by way of right.[15] In the State party's opinion, licensing in and of itself does not violate article 27. The State party further explains that under an Ontario recreational fishing licence, a person may choose to fish not for recreational purposes but for food, social, educational or ceremonial purposes.

11.7 The State party contests the author's argument that the catch limits under the regulations limit him to fishing for personal consumption only. It explains that there are no limits on the number of fish he can catch in the waters on and adjacent to the reserves, and that in the waters beyond this area in open season he can catch unlimited yellow perch and panfish, as well as daily 6 walleye, 6 bass, 6 northern pike, 5 trout or salmon, 1 muskellunge and 25 whitefish. The State party concludes that it is thus untenable to suggest that the author can fish for personal consumption only. It further notes that the author has not presented any evidence as to the needs of his extended family and why they cannot be met.

11.8 The State party also contests the author's statement that he is prohibited from fishing in the traditional territory of the Hiawatha First Nation from 16 November to late April every year and reiterates that the author can fish year round in the waters of Rice Lake and the Otonabee river adjacent to the Hiawatha First Nation reserve, as well as in the waters adjacent to the islands in the Trent reserve. With a recreational licence, he can also fish in Scugog Lake in January and February, as well as in lakes and rivers of neighbouring fishing divisions. In this context, the State party notes that the author has presented no evidence that would support his assertion that these waters are outside the traditional territory and fishing grounds of the Hiawatha Nation. According to the State party evidence shows on the contrary that the seven Williams Treaties First Nations shared their traditional territory.

11.9 Finally, the State party reiterates that the author's requests for findings and remedies on behalf of others than himself are beyond the scope of the admissibility decision in the present case. The State party recalls that the Hiawatha First Nation and the other Williams Treaties First Nations are in the midst of litigation with the Crown on behalf of their members, as they are seeking a judicial remedy for an alleged breach of the Crown's fiduciary duty with respect of the surrender of certain hunting, fishing and trapping rights in the Williams Treaties. It would therefore be inappropriate for the author to seek findings and remedies on behalf of the First Nations when they are not properly before the Committee, and these findings would presuppose the result in the Williams Treaties First Nations' domestic litigation. If the Committee, contrary to the State party, were to find that the author's article 27 rights as they relate to fishing had been infringed, legislative and regulatory mechanisms exist by which the State could provide increased fishing opportunities to the author and his community.

11.10 In his reply to the State party's further submission, the author, in a submission dated 5 April 2005, submits that the islands in the shared Trent Waters Reserve, although numerous, are extremely small, many constituting groups of bare rocks and that the fishing opportunities are thus insignificant. The average size of the islands is said to be 1.68 acre or 0.68 hectare.

11.11 The author further reiterates that the comparison with modern treaties is useful and shows that notwithstanding urban and economic development and non reliance by some Aboriginal persons on traditional activities for subsistence, all treaties except for the Williams Treaties recognize and protect hunting, fishing and trapping rights as well as their exercise over a reasonable part of the indigenous' community's traditional territory.

11.12 In reply to the State party's assertion that the author has not provided evidence that Lake Scugog and other lakes and rivers of neighbouring fishing divisions are outside the traditional fishing grounds of the Hiawatha First Nation, the author refers to a map indicating Mississauga family hunting territories, based on the description of these territories made during testimony to the Williams Treaty Commissioners in 1923. According to the author the map shows that Hiawatha traditional hunting territory was located near Rice Lake and did not include Lake Scugog.

11.13 The author also takes issue with the State party's statement that the Williams Treaty was properly negotiated with the author's First Nation, and argues that there was only one day of hearing in the community and that the communities' legal counsel was not allowed to participate. No attention was paid to the cultural and religious significance of fishing for the Mississauga and traditional non-commercial fishing rights were almost extinguished. Accordingly, the author reiterates his argument that the State party has not implemented the Williams Treaties in a way to ensure that the author is able to enjoy his culture.

11.14 In reply to the State party's argument that the article 27 does not require that a cultural activity be protected by way of right, the author argues that his situation is distinguishable from the situation of the author in the case referred to by the State party. In that case, the Committee found that the legislation affecting the author's rights had a reasonable and objective justification and was necessary for the continued viability and welfare of the minority as a whole. The same cannot be said of the fishing regulations applied to the author in the present case.

11.15 The author rejects the State party's argument that he has raised new claims by bringing up the issue of fishing methods as it would be artificial to distinguish between his right to fish and the particular manner in which that right is exercised. He emphasizes that this is not a new claim but that it is the same claim that he has brought under article 27 before the admissibility decision of the Committee.

11.16 The author rejects the State party's argument that he is requesting an inappropriate remedy. He states that no substantive negotiations have taken place between the First Nations and Ontario, but only preparatory meetings. The author further argues that during these meetings it had been agreed that the fact that discussions were occurring would not be interpreted or put forward as an admission of fact, law or other acknowledgement contrary to the position of the parties in the present communication, and that the State party's argument thus breaches this agreement. The author reiterates that the only sufficient remedy is the negotiation in good faith on a timely basis of an agreement that would, on a secure and long-term basis, enable the author to enjoy his culture, and that the tools best suited for this task in Canadian domestic law are treaty protected rights.

The Committee's consideration of the merits of the communication

12.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1 of the Optional Protocol.

12.2 In relation to the scope of the decision on admissibility in the present case, the Committee observes that at the time of the admissibility decision, the author had presented no elements in substantiation of his claim concerning the right to hunt, trap and gather or concerning the exhaustion of domestic remedies in this respect. The Committee also notes that the author has raised claims concerning the denial of the use of traditional fishing methods and catch limits only after the communication was declared admissible. In the Committee's opinion, nothing would have stopped the author from making these claims in due time, when submitting his communication, if he had so wished. Since the State party had not been requested to make submissions on the admissibility of these aspects of the author's claim and the domestic remedies which the author exhausted only dealt with his conviction for fishing out of season, these aspects of the author's claim were not encompassed in the Committee's admissibility decision and the Committee will therefore not consider these issues.

12.3 Both the author and the State party have made frequent reference to the 1923 Williams Treaty which was concluded between the Crown and the Hiawatha First Nation and which according to the Courts of the State party extinguished the author's Nation's right to fish outside their reserves or their adjacent waters. This matter, however, is not for the Committee to determine.

12.4 The Committee notes that it is undisputed that the author is a member of a minority enjoying the protection of article 27 of the Covenant and that he is thus entitled to the right, in community with the other members of his group, to enjoy his own culture. It is not disputed that fishing forms an integral part of the author's culture.

12.5 The question before the Committee, as determined by its admissibility decision, is thus whether Ontario's Fishing Regulations as applied to the author by the courts have deprived him, in violation of article 27 of the Covenant, of the ability to exercise, individually and in community with other members of his group, his aboriginal fishing rights which are an integral part of his culture.

12.6 The State party has submitted that the author has the right to fish throughout the year on and adjacent to his Nation's reserves and that, with a fishing licence, he can also fish in other areas in the region which are open for fishing when the area surrounding the reserves is closed. The author has argued that there is not enough fish on and adjacent to the reserves to render the right meaningful and that the other areas indicated by the State party do not belong to his Nation's traditional fishing grounds. He has moreover argued that fishing with a licence constitutes a privilege, whereas he claims to fish as of right.

12.7 Referring to its earlier jurisprudence, the Committee considers that States parties to the Covenant may regulate activities that constitute an essential element in the culture of a minority, provided that the regulation does not amount to a de facto denial of this right.[16] The Committee must therefore reject the author's argument that the requirement of obtaining a fishing licence would in itself violate his rights under article 27.

12.8 The Committee notes that the evidence and arguments presented by the State party show that the author has the possibility to fish, either pursuant to a treaty right on and adjacent to the reserves or based on a licence outside the reserves. The question whether or not this right is sufficient to allow the author to enjoy this element of his culture in community with the other members of his group, depends on a number of factual considerations.

12.9 The Committee notes that, with regard to the potential catch of fish on and adjacent to the reserves, the State party and the author have given different views. The State party has provided detailed statistics purporting to show that the fish in the waters on and adjacent to the reserves are sufficiently abundant so as to make the author's right to fish meaningful and the author has denied this. Similarly, the parties disagree on the extent of the traditional fishing grounds of the Hiawatha First Nation.

12.10 The Committee notes in this respect that these questions of fact have not been brought before the domestic courts of the State party. It recalls that the evaluation of facts and evidence is primarily a matter for the domestic courts of a State party, and in the absence of such evaluation in the present case the Committee's task is greatly impeded.

12.11 The Committee considers that it is not in a position to draw independent conclusions on the factual circumstances in which the author can exercise his right to fish and their consequences for his enjoyment of the right to his own culture. While the Committee understands the author's concerns, especially bearing in mind the relatively small size of the reserves in question and the limitations imposed on fishing outside the reserves, and without prejudice to any legal proceedings or negotiations between the Williams Treaties First Nations and the Government, the Committee is of the opinion that the information before it is not sufficient to justify the finding of a violation of article 27 of the Covenant.

13. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it do not disclose a violation of the International Covenant on Civil and Political Rights.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] In the first preambular paragraph to the treaty, it reads: "WHEREAS, the Mississauga Tribe above described, having claimed to be entitled to certain interests in the lands of the Province of Ontario, hereinafter described, such interests being the Indian Title of the said Tribe to fishing, hunting and trapping rights over the said lands, of which said rights His Majesty, through His said Commissioners, is desirous of obtaining a surrender …".

[2] *R. v. Sparrow* [1990] 1 SCR 1075 (SCC).

[3] *R. v. Adams* [1996] 3 SCR 101 (SCC).

[4] Case No. 197/1985, Views adopted on 27 July 1988.

[5] *Lovelace v. Canada*, case No. 24/1977, Views adopted on 19 September 1979.

[6] The State party provides documentation in the form of an application for funding identifying work on "United Nations petition" as part of a First Nations' workplan.

[7] *Davidson v. Canada*, case No. 359/1989, Views adopted 31 March 1993, and *Länsman v. Finland* case No. 671/995, Views adopted on 30 October 1996.

[8] The author refers to *Ontario (Attorney-General) v. Bear Island Foundation* [1991] 2 SCR 570 (SCC).

[9] See *Ominayak et al. v.* Canada, case No. 167/1984, Views adopted on 26 March 1990, at para. 32.1.

[10] See *Jonassen et al. v. Norway*, case No. 942/2000, decision adopted on 25 October 2002.

[11] The State party indicates that with a resident sport fishing license, the author can daily catch and possess: 6 walleye, 6 mouth bass, 6 northern pike, 5 trout or salmon, 1 muskellunge, 25 whitefish and unlimited yellow perch, crappie, carp and catfish.

[12] *Kitok v. Sweden*, communication No. 197/1985, adopted on 27 July 1998, CCPR/C/33/D/197/1985.

[13] See the Human Rights Committee's general comment No. 23, the rights of minorities to enjoy, profess and practice their own culture, 1994.

[14] A further State party's submission dated 2 June 2005 was received by the Committee. This submission, however, was considered by the Committee to contain no new elements.

[15] The State party refers to the Committee's Views in *Kitok v. Sweden*, communication No. 197/1985, CCPR/C/33/D/197/1985, para. 9.8.

[16] See inter alia *Kitok v. Sweden*, communication No. 197/1985, Views adopted on 27 July 1988, CCPR/C/33/D/197/1985 and *Länsmann v. Finland*, communication No. 511/1992, Views adopted on 26 October 1994, CCPR/C/52/D/511/1992 and communication No. 671/1995, Views adopted on 30 October 1996, CCPR/C/58/D/671/1995.

C. Communication No. 903/2000, *Van Hulst v. The Netherlands* (Views adopted on 1 November 2004, eighty-second session)*

Submitted by:	Antonius Cornelis Van Hulst (represented by counsel, Mr. Taru Spronken)
Alleged victim:	The author
State party:	The Netherlands
Date of communication:	8 April 1998 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 1 November 2004,

Having concluded its consideration of communication No. 903/1999, submitted to the Human Rights Committee on behalf of Antonius Cornelis Van Hulst under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Antonius Cornelis Van Hulst, a Dutch citizen. He claims to be a victim of violations by the Netherlands[1] of articles 14 and 17 of the Covenant. He is represented by counsel.

1.2 A similar communication, based on the same facts, was submitted on 7 September 1998 by Mr. A.T.M.M., also claiming to be a victim of a violation by the Netherlands of article 17 of the Covenant. Mr. A.T.M.M. did not pursue his claim subsequently and, despite a reminder, did not inform the Committee whether he wished to maintain his communication.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Franco Depasquale, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

The facts as submitted by the author

2.1 During a preliminary inquiry against Mr. A.T.M.M., the author's lawyer, telephone conversations between A.T.M.M. and the author were intercepted and recorded. On the basis of the information obtained by this operation, a preliminary inquiry was opened against the author himself, and the interception of his own telephone line was authorized.

2.2 By judgement of 4 September 1990, the District Court of 's-Hertogenbosch convicted the author of participation in a criminal organization, persistent acquisition of property without intent to pay, fraud and attempted fraud, extortion, forgery and handling stolen goods, and sentenced him to six years' imprisonment.

2.3 During the criminal proceedings, counsel for the author contended that the public prosecutor's case should not be admitted, because the prosecution's case contained a number of reports on telephone calls between the author and his lawyer, A.T.M.M. which it was unlawful to receive in evidence. Counsel argued that, in accordance with article 125h,[2] paragraph 2, read in conjunction with section 218,[3] of the Code of Criminal Procedure, the evidence obtained unlawfully should have been discarded.

2.4 Although the District Court agreed with the author that the telephone calls between him and A.T.M.M., could not be used as evidence, insofar as the latter acted as the author's lawyer and not as a suspect, it rejected the author's challenge to the prosecution's case, noting that the prosecutor had not relied on the contested telephone conversations in establishing the author's guilt. While the Court ordered their removal from the evidence, it admitted and used as evidence other telephone conversations, which had been intercepted and recorded in the context of the preliminary inquiry against A.T.M.M., in accordance with section 125g[4] of the Code of Criminal Procedure, and which did not concern the lawyer-client relationship with the author.

2.5 On appeal, the author's defence counsel argued that not all records of the tapped telephone calls, which should have been destroyed pursuant to section 125h, paragraph 2, had in fact been destroyed. However, by judgement of 10 April 1992, the-Hertogenbosch Court of Appeal rejected this defence, stating that the author's request to examine whether the reports in question had been destroyed would be irrelevant, "as their absence from the case file would provide no certainty about [their destruction]." The Court convicted the author of persistent acquisition of property without intent to pay, forgery, and resort to physical threats, without making use of the telephone records, and sentenced him to five years' imprisonment.

2.6 Before the Supreme Court, the author's defence counsel stated that the Court of Appeal had not responded to his defence that the records of the telephone conversations with his lawyer had been illegally obtained without having subsequently been destroyed. The Supreme Court rejected this argument and, by decision of 30 November 1993, for different reasons, it partially quashed the judgement of the Court of Appeal on two counts, as well as the sentence, and referred the matter back to the Arnhem Court of Appeal.

2.7 On 24 March 1995, the Arnhem Court of Appeal acquitted the author on one count and sentenced him to three years' imprisonment on the other counts. In his cassation appeal against this judgement, the author contended that his defence relating to the tapped telephone calls had till not been responded to. On 16 April 1996, the Supreme Court dismissed the appeal, without reasons, referring to section 101a[5] of the Judiciary Act.

2.8 On 22 October 1996, the author applied to the European Commission of Human Rights, alleging, inter alia, a violation of article 6 of the European Convention. By decision of 8 December 1997,[6] the Commission declared the application inadmissible, on the ground that "an appeal tribunal does not violate article 6 of the Convention when, basing itself on a specific legal provision, it rejects an appeal as having no chances of success without giving further reasons for that decision." Regarding the author's other complaints, the Commission considered that they "[did] not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols."

The complaint

3.1 The author claims that the Supreme Court's dismissal, by mere reference to section 101a of the Judiciary Act, of his defence relating to the tapped telephone calls, as well as the admission as evidence and use of reports on tapped telephone calls between him and his lawyer, violated his rights under article 14 of the Covenant, and that the interference with his right to confidential communication with his lawyer was unlawful and arbitrary, in violation of article 17 of the Covenant.

3.2 The author submits that the courts' failure to give any reasons for dismissing his defence made his right to appeal his conviction meaningless. In particular, the Supreme Court's exercise of its discretion, based on section 101a of the Judiciary Act, to simply state that a petition may not lead to cassation of the original judgement or that it does not require that questions of law be answered in the interest of the uniformity or development of the law, deprived him of an opportunity to prepare his legal arguments for his complaint to the Committee or, for that matter, to the European Commission of Human Rights.

3.3 The author submits that article 121 of the Dutch Constitution requires that judgements state the reasons on which they are based; exceptions to this rule must be defined by law and must be restricted to an absolute minimum. Accordingly, section 101a, which was introduced in 1988 with a view to reducing the workload and strengthening the efficiency of the Supreme Court, cannot justify the denial of a defendant's right to know the reasons for dismissal of his appeal so as to adequately prepare his defence.

3.4 The author refers to the relevant jurisprudence[7] of the European Court of Human Rights, according to which national courts must indicate with sufficient clarity on what grounds they base their decisions, so as to enable the accused meaningfully to exercise his right to appeal. In view of the similarities between article 6 of the European Convention and article 14 of the Covenant, it is argued that the restrictive exceptions to this principle, which can be inferred from the European Court's jurisprudence, also apply to article 14 of the Covenant. Accordingly, no reasons need to be given by a court: (a) if a lower court has already rendered a reasoned judgement in the same matter; (b) if a judgement is not subject to appeal; (c) in relation to non-essential arguments; (d) in the context of a leave system; and (e) in relation to a decision on admissibility.

3.5 For the author, the above exceptions do not apply in his case because: (a) none of the courts seized with his case responded, in a substantive and comprehensive manner, to his challenge to the use of the tapped telephone calls in the criminal proceedings; (b) although the judgement of the Supreme Court of 16 April 1996 was not subject to further appeal at the national level, it should have been reasoned in order to allow the author to prepare a complaint to the Committee and/or the European Commission of Human Rights; (c) his defence could not be dismissed as non-essential, since it related to violations of his rights to privacy and to a fair trial; and (d) the Supreme Court's discretion to dismiss a cassation appeal on the basis of section 101a of the Judiciary Act cannot be compared to a leave system, as the provision empowers the Court "to waive any provision of reasons altogether."

3.6 With regard to his claim under article 17, the author submits that, as a client of Mr. A.T.M.M., he should have been accorded judicial protection from the wire tapping and recording of his telephone conversations with his lawyer, since he could not know that the latter was a suspect in criminal investigations. The right to consult a lawyer of one's own choice is undermined if the protection of confidentiality depends on whether a lawyer is himself a criminal suspect or not.

3.7 The author submits that his right, under article 17, not to be subjected to arbitrary or unlawful interference with his privacy includes a right to confidential communication with his lawyer, which can only be restricted (a) in accordance with the law; (b) for a legitimate purpose; and (c) if the interference is proportionate to the aim pursued.

3.8 Although the author concedes that combating crime is a legitimate purpose, he challenges the Supreme Court's jurisprudence that section 125h, paragraph 2, of the Code of Criminal Procedure, while requiring the destruction of reports on tapped telephone calls involving a person entitled to decline to give evidence, does not preclude that cognizance may be taken of information which falls within the scope of section 218 of the Code of Criminal Procedure, as it is not clear in advance whether the conversation involves a person bound by law to observe confidentiality. Rather, section 125h, paragraph 2, should be read to forbid strictly the tapping of telephone connections of a lawyer/suspect, "as all confidential conversations must immediately be destroyed". Otherwise information could be gathered by means of interception and recording, which could normally not be obtained through the statements of witnesses or suspects. The author adds that the tapping of telephone calls between him and his lawyer was a disproportionate measure.

The State party's observations on admissibility and merits

4.1 In its observations dated 23 April 2003, the State party, while not contesting the admissibility of the communication, argues that neither the Supreme Court's reference to section 101a of the Judiciary Act, nor the admission as evidence of tapped telephone conversations between the author and Mr. A.T.M.M., violated the author's right to a fair trial under article 14, and that the interference with his privacy and correspondence was neither unlawful nor arbitrary.

4.2 While conceding that the right to a fair trial, in principle, requires tribunals to state the grounds for their judgements, the State party submits that the right to have a reasoned judicial decision is not absolute, but rather depends on the nature of the decision, the circumstances of each individual case and the stage of the proceedings. The European Court's jurisprudence[8] that appellate courts may, in principle, simply endorse the reasons stated in the lower court's decision must a fortiori also apply to the reasoning required from Supreme Courts, which, like Constitutional Courts, often dismiss appeals in a cursory manner.

4.3 Section 101a of the Judiciary Act was introduced as an efficiency measure, to ensure that the Supreme Court would be able to handle its growing workload. The provision was examined, and complaints against it declared manifestly ill-founded, by the European Court.[9] The mere existence of section 101a cannot therefore be said to violate article 14 of the Covenant.

4.4 The State party rejects the author's argument that the application of section 101a reduced his possibilities to defend himself before the Committee, arguing that the guarantees of article 14 of the Covenant only apply to appeals at the national level. Insofar as the author complains that his right to petition the Committee was curtailed by the fact that the Supreme Court confined itself to merely referring to section 101a, the State party submits that the decision of the Supreme Court in no way affected the detailed reasons given by the courts in earlier stages of the proceedings. The author's allegation that no judicial body ever responded substantively to his defence relating to the tapped telephone calls with his lawyer was unfounded. Moreover, the Supreme Court only made reference to section 101a of the Judiciary Act after it had partially quashed the judgement of the Court of Appeal of 10 April 1992, and referred the case back to the Arnhem Court of Appeal by judgement of 30 November 1993.

4.5 As to the admission as evidence of certain recorded telephone conversations between the author and Mr. A.T.M.M., the State party submits that it is generally for the national courts, and not for the Committee, to assess the evidence before them, unless there are clear indications of a violation of article 14. For the State party, the proceedings as a whole must be considered fair because: (a) the District Court only admitted recordings of conversations between the author and his lawyer, insofar as they related to the latter's involvement in the commission of a criminal offence, and made it clear that neither the public prosecutor nor the Court itself based their findings on protected lawyer-client conversations; (b) no transcripts of the recordings were made or introduced in the case file, the recordings merely having been mentioned at trial, in compliance with the European Court's judgement in *Kruslin v. France*,[10] where the Court stressed the need to communicate such recordings in their entirety for possible inspection by the judge and the defence; (c) the reliability of the evidence was never disputed by the author, who merely complained that the information should have been erased; and (d) because the case file indicates that the author's conviction was not based on tapped conversations in which Mr. A.T.M.M. acted as a lawyer rather than a suspect.

4.6 Regarding the author's claim under article 17, the State party concedes that telephone calls made from or to a law firm may be covered by the notions of "privacy" or "correspondence" and that the interception of the author's telephone calls constituted "interference" within the meaning of this provision. By reference to the Committee's general comment 16,[11] it denies that this interference was unlawful or arbitrary within the meaning of article 17, which only prohibits interference not envisaged by law ("unlawful"), and which itself must comply with the provisions, aims and objectives of the Covenant, or which is not reasonable in the in the particular circumstances ("arbitrary").

4.7 The State party argues that the applicable law at the time, i.e. sections 125 litera f to h of the Code of Criminal Procedure, did not forbid the tapping of telephone conversations with persons bound by law to secrecy. The legislator, when enacting these provisions in 1971, did not indicate that they should not apply to persons bound by law to secrecy, within the meaning of section 218 of the Code of Criminal Procedure. Moreover, the applicable law, which then included detailed Guidelines for the Examination of Telephone Conversations, was sufficiently precise to authorize interference with the right to privacy, setting out procedural safeguards against abuse of power, such as the requirement of a judicial authorization of telephone taps and provision for the preparation and, in certain cases, destruction of official records on any interception.

4.8 The State party argues that the interference with the author's right to privacy pursued a legitimate purpose (combating crime) and was proportionate, as the District Court ensured that the tapped conversations, in which Mr. A.T.M.M. acted as the author's lawyer, rather than a suspect of criminal offences, were not taken into account in the criminal proceedings against the author. As for the conversations which were intercepted because A.T.M.M. was a suspect, thus not involving professional communication between a lawyer and his client, the State party argues that it is unreasonable to expect total impunity for the author and A.T.M.M. on the mere basis that the latter is also a lawyer.

4.9 Lastly, the State party argues that the detriments caused to the author by the fact that the conversation with A.T.M.M. was tapped are primarily a matter between private parties, as the author could have initiated civil proceedings against A.T.M.M., who could further be held responsible by means of disciplinary proceedings.

Author's comments

5.1 In his comments, dated 15 July 2003, on the State party's observations, the author reiterates his claims and expands on his argumentation relating to the alleged breach of article 17. He submits that the practical consequence of the Dutch courts' decisions is that, whenever a lawyer is suspected of a criminal offence and his telephone line is tapped for that reason, his clients can no longer claim the confidentiality of lawyer-client relationship or the guarantee of immediate destruction of the records of such telephone taps.

5.2 The author contends that the State party failed to differentiate between counsel-client conversations and suspect-suspect conversations, when it tapped the calls he made to A.T.M.M., which concerned a completely different matter than the one in which his lawyer was considered a suspect, thus putting the police onto the track of a possible new criminal offence, or when it subsequently tapped his own telephone connection, thereby putting the police on yet another track relating to an offence that again differed from the one for which the telephone was tapped, and of which his lawyer was then also suspected. The core of his complaint is the fact that the suspicion against him was raised as a result of intercepting confidential telephone contacts, the records of which should have been destroyed immediately, rather than including them in the court file as evidence against him.

5.3 The author concludes that the authorities' freedom to initiate investigations, on the basis of confidential information obtained through telephone interception, into any possible criminal offence that may have been committed by the client of a lawyer, whose telephone is tapped because he is the suspect of a criminal offence, constitutes a disproportionate interference with article 17 of the Covenant, which cannot be justified by the aim pursued. Any other interpretation would make the right to confidential telephone communication with one's lawyer illusory.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained, in accordance with article 5, paragraph 2 (a) and (b), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement and that the author has exhausted domestic remedies.

6.3 Insofar as the author alleges that the mere reference to section 101a of the Judiciary Act, in the Supreme Court's decision of 16 April 1996, deprived him of an opportunity adequately to elaborate the arguments in support of the present communication, the Committee observes that the guarantees of article 14, paragraphs 3 (b) and 5, which apply to domestic criminal proceedings, do not extend to the examination of individual complaints before international instances of investigation or settlement. This part of the communication is therefore inadmissible under article 3 of the Optional Protocol.

6.4 With regard to the author's claim that his right under article 14, paragraph 5, to have his conviction and sentence reviewed by a higher tribunal was violated, because the judgements other than that of 16 April 1996 by the Supreme Court did not give sufficient reasons for the courts' dismissal of his defence challenging the lawfulness of the evidence obtained, the Committee recalls that, where domestic law provides for several instances of appeal, a convicted person must have effective access to all of them. To ensure the effective use of this right, the convicted person is entitled to have access to duly reasoned, written judgements in the trial court and at least in the court of first appeal.

6.5 The Committee notes that the judgements of the 's-Hertogenbosch District and Appeal Courts, as well as the judgement of the Supreme Court dated 30 November 1993 and the judgement of the Arnhem Court of Appeal, do give reasons for the dismissal of the author's defence. It recalls that it is generally for the national tribunals, and not for the Committee, to evaluate the facts and evidence in a particular case, unless it can be ascertained that the proceedings before these tribunals were clearly arbitrary or amounted to a denial of justice. The Committee considers that the author has not substantiated, for purposes of admissibility, that the reasons given by the Dutch courts for rejecting his challenge to the admissibility of the prosecution's case were arbitrary or amounted to a denial of justice. It must therefore follow that this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.6 Concerning the claim that the admission as evidence of certain tapped telephone conversations between the author and A.T.M.M., and their use during the criminal proceedings in general, violated his right to a fair trial, the Committee does not consider that the District Court's differentiation between records of tapped telephone calls that could be used as evidence, as they related to conversations which were intercepted in the context of the preliminary inquiry against A.T.M.M., and records of conversations, in which A.T.M.M. acted as the author's lawyer, that could not be used as evidence and should be removed from the file and destroyed, was arbitrary. Although the author contends that the Dutch authorities did not differentiate between counsel-client and suspect-suspect conversations, since his calls to Mr. A.T.M.M. concerned different matters than the one in which his lawyer was a suspect, he has not substantiated this claim. This part of the communication is also inadmissible under article 2 of the Optional Protocol.

6.7 The Committee considers that the author has substantiated, for purposes of admissibility, that the interception of telephone conversations between him and his lawyer, as well as the State party's failure to destroy the recordings of certain tapped calls, may raise issues under article 17 of the Covenant. It therefore concludes that the communication is admissible insofar as it raises issues under article 17.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

7.2 The issue before the Committee is whether the interception and recording of the author's telephone calls with Mr. A.T.M.M. constituted an unlawful or arbitrary interference with his privacy, in violation of article 17 of the Covenant.

7.3 The Committee recalls that, in order to be permissible under article 17, any interference with the right to privacy must cumulatively meet several conditions set out in paragraph 1, i.e. it must be provided for by law, be in accordance with the provisions, aims and objectives of the Covenant and be reasonable in the particular circumstances of the case.[12]

7.4 The Committee notes that section 125g of the Dutch Code of Criminal Procedure authorizes the investigating judge to order, during the preliminary judicial investigation, the interception or recording of data traffic, in which the suspect is believed to be taking part, provided that this is strictly required in the interests of the investigation and relates to an offence for which pretrial detention may be imposed. The author has not contested that the competent authorities acted in accordance with the requirements of this provision. The Committee is therefore satisfied that the interference with his telephonic conversations with Mr. A.T.M.M. was lawful within the meaning of article 17, paragraph 1, of the Covenant.

7.5 One other question which arises is whether the State party was required by section 125h, paragraph 2, read in conjunction with section 218 of the Code of Criminal Procedure, to discard and destroy any information obtained as a result of the interception and recording of the author's conversations with Mr. A.T.M.M., insofar as the latter acted as his lawyer and as such was subject to professional secrecy. The Committee notes, in this regard, that the author challenges the Supreme Court's jurisprudence that cognizance may be taken of tapped telephonic conversations involving a person entitled to decline evidence, even though section 125h, paragraph 2, provides that the reports on such conversations must be destroyed. The Committee considers that an interference is not "unlawful", within the meaning of article 17, paragraph 1, if it complies with the relevant domestic law, as interpreted by the national courts.

7.6 Finally, the Committee must consider whether the interference with the author's telephonic conversations with Mr. A.T.M.M. was arbitrary or reasonable in the circumstances of the case. The Committee recalls its jurisprudence that the requirement of reasonableness implies that any interference with privacy must be proportionate to the end sought, and must be necessary in the circumstances of any given case.[13] The Committee has noted the author's argument that clients can no longer rely on the confidentiality of communication with their lawyer, if there is a risk that the content of such communication may be intercepted and used against them, depending on whether or not their lawyer is suspected of having committed a criminal offence, and irrespective of whether this is known to the client. While acknowledging the importance of protecting the confidentiality of communication, in particular that relating to communication between lawyer and client, the Committee must also weigh the need for States parties to take effective measures for the prevention and investigation of criminal offences.

7.7 The Committee recalls that the relevant legislation authorizing interference with one's communications must specify in detail the precise circumstances in which such interference may be permitted and that the decision to allow such interference can only be taken by the authority designated by law, on a case-by-case basis.[14] It notes that the procedural and substantive requirements for the interception of telephone calls are clearly defined in section 125g of the Dutch Code of Criminal Procedure and in the Guidelines for the Examination of Telephone Conversations of 2 July 1984. Both require interceptions to be based on a written authorization by the investigating judge.

7.8 The Committee considers that the interception and recording of the author's telephone calls with A.T.M.M. did not disproportionately affect his right to communicate with his lawyer in conditions ensuring full respect for the confidentiality of the communications between them, as the District Court distinguished between tapped conversations in which A.T.M.M. participated as the author's lawyer, and ordering their removal from the evidence, and other conversations, which were admitted as evidence because they were intercepted in the context of the preliminary inquiry against A.T.M.M. Although the author contested that the State party accurately made this distinction, he has failed to substantiate this challenge.

7.9 Insofar as the author claims that the reports of the tapped conversations between him and his lawyer should have been destroyed immediately, the Committee notes the State party's uncontested argument that the records of the tapped conversations were kept intact in their entirety, separately from the case file, for possible inspection by the defence. As the right to privacy implies that every individual should have the right to request rectification or elimination of incorrect personal data in files controlled by public authorities,[15] the Committee considers that the separate storage of the recordings of the author's tapped conversations with Mr. A.T.M.M. cannot be regarded as unreasonable for purposes of article 17 of the Covenant.

7.10 In the light of the foregoing, the Committee concludes that the interference with the author's privacy in regard to his telephone conversations with A.T.M.M. was proportionate and necessary to achieve the legitimate purpose of combating crime, and therefore reasonable in the particular circumstances of the case, and that there was accordingly no violation of article 17 of the Covenant.

7.11 The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it do not disclose any violation of article 17 of the Covenant.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] The Covenant and the Optional Protocol to the Covenant both entered into force for the State party on 11 March 1979.

[2] Section 125h of the Code of Criminal Procedure reads, in pertinent parts: "(1) The investigating judge shall, as soon as possible, order the destruction in his presence of any official reports or other objects from which information may be obtained that has been acquired as a result of the provision of information referred to in section 125f, or of the interception or recording of data traffic referred to in section 125g, and which is of no relevance to the investigation. An official report shall immediately be drawn up on the said destruction. (2) The investigating judge shall, in the same way, order the destruction without delay of any official reports or other objects, as referred to in paragraph 1, if they relate to statements made by or to a person who would be able to decline to give evidence, pursuant to section 218, if he were asked as a witness to disclose the content of the statements. (3) […] (4) […]" (Translation provided by the State party.)

[3] Section 218 of the Code of Criminal Procedure reads: "Those who are bound to secrecy by virtue of their position, profession or office may decline to give evidence or to answer certain questions, but only in so far as the information concerned was imparted to them in that capacity." (Translation provided by the State party.)

[4] Section 125g of the Code of Criminal Procedure reads: "During the preliminary judicial investigation, the investigating judge is empowered to order an investigating officer to intercept or record data traffic not intended for the public, which is carried via the telecommunications infrastructure, and in which he believes that the suspect is taking part, provided this is urgently necessary in the interests of the investigation and concerns an offence for which pretrial detention may be imposed. An official report of such interception or recording shall be drawn up within forty-eight hours." (Translation provided by the State party.)

[5] Section 101a (old; currently section 81) of the Judiciary Act reads: "If the Supreme Court considers that a petition may not lead to cassation of the original judgement or that it does not require that questions of law be answered in the interests of the uniformity or development of the law, it may confine itself to stating this opinion in that part of the judgement containing the grounds on which it is based." (Translation provided by the State party.)

[6] European Commission of Human Rights, decision as to the admissibility of application No. 36442/97 by A.H. against the Netherlands, 8 December 1997.

[7] European Court of Human Rights, *Hadjianastassiou v. Greece*, judgement of 16 December 1992, Series A, No. 252.

[8] European Court of Human Rights, *Garcia Ruiz v. Spain*, application No. 30544/96, judgement of 21 January 1999, at para. 26.

[9] The State party refers to the European Court's decisions in *Polman v. The Netherlands*, application No. 48334/99, decision on admissibility of 9 July 2002 and *Mink Kok v. The Netherlands*, application No. 43149/98, decision on admissibility of 4 July 2000.

[10] Judgement of 24 April 1990, Series A-176-A, at para. 35.

[11] General comment 16 [32], at paras. 3-4.

[12] General comment 16 [32], at paras. 3-4.

[13] See communication No. 488/1992, *Toonen v. Australia*, at para. 8.3.

[14] General comment 16 [32], at para. 8.

[15] Ibid., at para. 10.

D. Communication No. 912/2000, *Ganga v. Guyana* (Views adopted on 1 November 2004, eighty-second session)*

Submitted by:	Mrs. Deolall (not represented by counsel)
Alleged victim:	Mr. Deolall (the author's husband)
State party:	The Republic of Guyana
Date of initial communication:	17 August 1998 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 1 November 2004,

Having concluded its consideration of communication No. 912/2000, submitted to the Human Rights Committee on behalf of Mr. Deolall, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication, dated 17 August 1998, is Mrs. Deolall. She submits the communication on behalf of her husband, Mr. Deolall, currently imprisoned in Guyana under sentence of death.[1] They are both Guyanese citizens. She claims that her husband is a victim of human rights violations by Guyana. Although she does not invoke any specific articles of the Covenant, her communication appears to raise issues under articles 14, and 6 of the Covenant. The alleged victim is not represented by counsel.

1.2 In accordance with rule 86 of the Committee's rules of procedure, the Committee through its Special Rapporteur on new communications, on 7 February 2000 requested the State party not to carry out the death sentence against Mr. Deolall, while his case is under consideration by the Committee. There has been no reply from the State party to this request.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

The facts as submitted by the author

2.1 Mr. Deolall was arrested on 26 October and charged with murder on 3 November 1993. On 22 November 1995, he was convicted of murder and sentenced to death in the Georgetown Criminal Assizes Court. He appealed to the High Court and subsequently to the Court of Appeal. The grounds of appeal to the Court of Appeal were that (a) the trial judge had erred in not putting the accused's defence adequately to the jury, and (b) that the trial judge had erroneously admitted inadmissible evidence, i.e. an alleged involuntary confession. The Court of Appeal dismissed his appeal and the Chief Justice confirmed the death sentence on 30 January 1997. With this it is submitted that all domestic remedies are exhausted. The author notes that Mr. Deolall has been on death row since November 1995, and that his sentence should have been commuted.

2.2 According to the author, Mr. Deolall was convicted on the basis of a single piece of evidence, namely the confession, which he is alleged to have signed after being subjected to ill-treatment during the interrogation by police officers. Although the police record shows that Mr. Deolall had no marks of violence on his body, at the trial it was disclosed that he had such marks when he had been examined individually by three doctors. It appears from the trial transcript, submitted by the author, that Mr. Deolall was examined on 30 October 1993 and 8 November 1993. Dr. Persaud saw him on 30 October 1993, and in a medical report stated that the "examination revealed a small bruise on the lower level of the left alliae fosse region (lower region of the left side of the abdomen)". Dr. Maynard saw him on the same day and had a similar finding. Dr. Joshua Deen day saw him on 8 November 1993, and stated in his medical report that Mr. Deolall had "scratch marks on his back" and that in his view they were received between 27 October 1993 and 31 October 1993, i.e. prior to making the alleged statement.

2.3 According to the author "Mr. Deolall's brother who was a suspect for the same crime was shot by the police but he was never charged".

2.4 On 1 June 2004, the author provided new factual information on the circumstances of the trial and the conditions of detention.

The complaint

3.1 The author claims that her husband was beaten and ill-treated by police officers during interrogations at the police station.

3.2 It is claimed that Mr. Deolall was innocent and that the trial against him was unfair.

3.3 The author claims that her husband was forced to sign a confession after being beaten by police officers, and that this confession was the only basis upon which he was convicted.

Issues and proceedings before the Committee

Consideration of admissibility

4.1 On 7 February 2000, 28 February 2001, 24 July 2001, and 8 April 2004, and 9 August 2004, the State party was requested to submit to the Committee information on the admissibility and merits of the communication. The Committee notes that this information has still not been received. The Committee regrets the State party's failure to provide any information with regard to the admissibility or the substance of the author's claims. It recalls that it is implicit in article 4, paragraph 2, of the Optional Protocol that States parties examine in good faith all the allegations brought against them, and that they make available to the Committee all information at their disposal. In the absence of a reply from the State party, due weight must be given to the author's allegations, to the extent that these have been properly substantiated.

4.2 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.3 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a), of the Optional Protocol.

4.4 Mr. Deolall has appealed his conviction, an appeal that was dismissed. In the absence of arguments to the contrary, the Committee considers that Mr. Deolall has exhausted domestic remedies.[2]

4.5 The Committee notes that the communication was submitted prior to Guyana's denunciation of the Optional Protocol on 5 January 1999 and its re-accession to it with a reservation related to the competence of the Committee to examine death penalty cases. It concludes therefore that its jurisdiction is not affected by this denunciation. The Committee can find no reasons to consider this communication inadmissible and proceeds to a consideration of the merits.

Consideration of the merits

5.1 The author claims that Mr. Deolall was ill-treated during interrogations by police officers and forced to sign a confession statement, a claim that raises issues under article 14, paragraphs 1 and 3 (g) and article 6, of the Covenant. The Committee refers to its previous jurisprudence that the wording, in article 14, paragraph 3 (g), that no one shall "be compelled to testify against himself or confess guilt", must be understood in terms of the absence of any direct or indirect physical or psychological coercion from the investigating authorities on the accused with a view to obtaining a confession of guilt, and that it is implicit in this principle that the prosecution prove that the confession was made without duress.[3] In the current case, the Committee notes that the testimony of 3 doctors at the trial, that Mr. Deolall displayed injuries, as outlined in paragraph 2.2 above, as well as Mr. Deolall's own statement, would prima facie support the allegation that such ill-treatment indeed occurred during the police interrogations, prior to his signing of the confession statement. In its instructions to the jurors, the court clearly stated that if the jurors found that Mr. Deolall was beaten by the police prior to giving his confession, even though it was a slight beating, they could not attach any weight to that statement and would need to acquit the defendant. However, the Court did not instruct the jurors that they would need to be convinced that the prosecution had managed to prove that the confession was voluntary.

5.2 The Committee maintains its position that it is generally not in the position to evaluate facts and evidence presented before a domestic court. In the current case, however, the Committee takes the view that the instructions to the jury raise an issue under article 14 of the

Covenant, as the defendant had managed to present prima facie evidence of being mistreated, and the Court did not alert the jury that that the prosecution must prove that the confession was made without duress. This error constituted a violation of Mr. Deolall's right to a fair trial as required by the Covenant, as well as his right not to be compelled to testify against himself or confess guilt, which violations were not remedied upon appeal. Therefore, the Committee concludes that the State party has violated article 14, paragraphs 1, and 3 (g), of the Covenant in respect of Mr. Deolall.

5.3 The Committee recalls its jurisprudence that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, if no further appeal against the sentence is possible, a violation of article 6 of the Covenant.[4] In the present case, since the final sentence of death was passed without having observed the requirement for a fair trial set out in article 14, it must be concluded that the right protected by article 6 of the Covenant has also been violated.

6. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal violations by the State party of articles 6, and 14, paragraphs 1, 3 (g) of the Covenant.

7. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Deolall with an effective remedy, including release or commutation.

8. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about any measures taken to give effect to the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] The file contains no information on the place of detention.

[2] Guyana is not a member of the appeal procedure of the Privy Council, Judicial Committee.

[3] *Berry v. Jamaica*, case No. 330/1988, Views adopted on 4 July 1994 and *Nallaratnam Singarasa v. Sri Lanka*, case No. 1033/2001, Views adopted on 21 July 2004.

[4] *Taylor v. Jamaica*, communication No. 705/1996, *Levy v. Jamaica*, 719/1996.

E. Communication No. 931/2000, *Hudoyberganova v. Uzbekistan* (Views adopted on 5 November 2004, eighty-second session)*

Submitted by:	Ms. Raihon Hudoyberganova (not represented by counsel)
Alleged victim:	The author
State party:	Uzbekistan
Date of communication:	15 September 1999 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 5 November 2004,

Having concluded its consideration of communication No. 931/2000, submitted to the Human Rights Committee by Ms. Raihon Hudoyberganova, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Raihon Hudoyberganova, an Uzbek national born in 1978. She claims to be a victim of violations by Uzbekistan of her rights under articles 18 and 19 of the International Covenant on Civil and Political Rights.[1] She is not represented by counsel.

The facts as presented by the author

2.1 Ms. Hudoyberganova was a student at the Farsi Department at the Faculty of languages of the Tashkent State Institute for Eastern Languages since 1995 and in 1996 she joined the newly created Islamic Affairs Department of the Institute. She explains that as a practicing

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

The texts of three individual opinions signed by Committee members Mr. Hipólito Solari Yrigoyen, Sir Nigel Rodley and Ms. Ruth Wedgwood are appended to the present document.

Muslim, she dressed appropriately, in accordance with the tenets of her religion, and in her second year of studies started to wear a headscarf ("hijab"). According to her, since September 1997, the Institute administration began to seriously limit the right to freedom of belief of practicing Muslims. The existing prayer room was closed and when the students complained to the Institute's direction, the administration began to harass them. All students wearing the hijab were "invited" to leave the courses of the Institute and to study at the Tashkent Islamic Institute instead.

2.2 The author and the concerned students continued to attend the courses, but the teachers put more and more pressure on them. On 5 November 1997, following a new complaint to the Rector of the Institute alleging the infringement of their rights, the students' parents were convoked in Tashkent. Upon arrival, the author's father was told that Ms. Hudoyberganova was in touch with a dangerous religious group which could damage her and that she wore the hijab in the Institute and refused to leave her courses. The father, due to her mother's serious illness, took his daughter home. She returned to the Institute on 1 December 1997 and the Deputy Dean on Ideological and Educational matters called her parents and complained about her attire; allegedly, following this she was threatened and there were attempts to prevent her from attending the lectures.

2.3 On 17 January 1998, she was informed that new regulations of the Institute have been adopted, under which students had no right to wear religious dress and she was requested to sign them. She signed them but wrote that she disagreed with the provisions which prohibited students from covering their faces. The next day, the Deputy Dean on Ideological and Educational matters called her to his office during a lecture and showed her the new regulations again and asked her to take off her headscarf. On 29 January the Deputy Dean called the author's parents and convoked them, allegedly because Ms. Hudoyberganova was excluded from the students' residence. On 20 February 1998, she was transferred from the Islamic Affairs Department to the Faculty of languages. She was told that the Islamic Department was closed, and that it was possible to reopen it only if the students concerned ceased wearing the hijab.

2.4 On 25 March 1998, the Dean of the Farsi Department informed the author of an Order by which the Rector had excluded her from the Institute. The decision was based on the author's alleged negative attitude towards the professors and on a violation of the provisions of the regulations of the Institute. She was told that if she changed her mind about the hijab, the order would be annulled.

2.5 As to the exhaustion of domestic remedies, the author explains that on 10 March 1998, she wrote to the Ministry of Education, with a request to stop the infringement of the law in the Institute; allegedly, the result was the loss of her student status on 15 March 1998. On 31 March 1998, she filed a complaint with the Rector, claiming that his decision was illegal. On 13 April 1998, she complained to the Chairman of the Committee of Religious Affairs (Cabinet of Ministers); on 22 April 1998, the Chairman advised her to respect the Institute's regulations. On 14 April 1998, she wrote to the Spiritual Directorate of the Muslims in Uzbekistan, but did not receive "any written reply". On 3 March and 13 and 15 April 1998, she wrote to the Minister of Education and on 11 May 1998, she was advised by the Deputy Minister to comply with the regulations of the Institute.

2.6 On 15 May 1998, a new law "On the Liberty of Conscience and Religious Organisations" entered into force. According to article 14, Uzbek nationals cannot wear religious dress in public places.[2] The administration of the Institute informed the students that all those wearing the hijab would be expelled.

2.7 On 20 May 1998, the author filed a complaint with the Mirabadsky District Court (Tashkent), requesting to have her student rights restored. On 9 June 1998, the legal counsel of the Institute requested the court to order the author's arrest on the ground of the provisions of article 14 of the new law. Ms. Hudoyberganova's lawyer objected that this law violated human rights. According to the author, during the court's sitting on 16 June, her lawyer called on her behalf the lawyer of the Committee of Religious Affairs, who testified that the author's dresses did not constitute a cult dress.

2.8 On 30 June 1998, the Court dismissed the author's claim, allegedly on the ground of the provisions of article 14 of the Law on Freedom of Conscience and Religious Organizations. According to the author, the Institute provided the court with false documents to attest that the administration had warned her that she risked expulsion. The author then requested the General Prosecutor, the deputy Prime-Minister, and the Chairman of the Committee of Religious Affairs, to clarify the limits of the terms of "cult" (religious) dress, and was informed by the Committee that Islam does not prescribe a specific cult dress.

2.9 On 15 July 1998, the author filed an appeal against the District's court decision (of 30 June 1998) in the Tashkent City Court and on 10 September, the City Court upheld the decision. At the end of 1998 and in January 1999, she complained to the Parliament, to the President of the Republic, and to the Supreme Court; the Parliament and the President's administration transmitted her letters to the Supreme Court. On 3 February 1999 and on 23 March 1999, the Supreme Court informed her that it could find no reasons to challenge the courts' decisions in her case.

2.10 On 23 February 1999, she complained to the Ombudsman, and on 26 March 1999 received a copy of the reply to the Ombudsman of the Institute's Rector, where the Rector reiterated that Ms. Hudoyberganova constantly violated the Institute's regulations and behaved inappropriately with her professors, that her acts showed that she belonged to an extremist organization of Wahabits, and that he had no reason to readmit her as student. On 12 April 1999, she complained to the Constitutional Court and was notified that it had no jurisdiction to deal with her case and that her claim had been channelled to the General Prosecutor's Office, which had forwarded it to the Tashkent Prosecutor's Office. On 30 June 1999, the Tashkent Prosecutor's Office informed her that there were no reasons to annul the court's rulings in her case. On 1 July 1999, she complained again to the General Prosecutor with a request to have her case examined. She received no reply.

The complaint

3. The author claims that she is a victim of violations of her rights under articles 18 and 19 of the Covenant, as she was excluded from University because she wore a headscarf for religious reasons and refused to remove it.

State party's observations

4.1 On 24 May 2000, 26 February 2001, 11 October 2001, and 3 September 2004, the State party was requested to submit to the Committee information and comments on the admissibility and merits of the communication. The State party presented its comments on 21 October 2004. It recalls that on 21 May 1998, the author applied to the Mirabad District Court of Tashkent with a request to acknowledge the illegality of her dismissal from the Tashkent State Institute of Eastern Languages and to restore her as a student. On 30 June 1998, the Mirabadsky District Court dismissed her appeal.

4.2 The State party explains that according to the Court's civil case, it transpired that the author was admitted in the Faculty of Languages in the Institute in 1995, and in 1996 she continued her studies in the Faculty of History (Islamic Department). According to paragraph 2 (d) of the Internal Regulations (regulating the rights and obligations of the Institute's students), in the Institute, students are forbidden to wear clothes "attracting undue attention", and forbidden to circulate with the face covered (with a hijab). This regulation was discussed at a general meeting of all students on 15 January 1998. The author was presented the text and she made a note that she disagrees with the requirements of paragraph 2 (d). On 26 January 1998, the Dean of the Faculty of History warned her that she violated the provisions of paragraph 2 (d), of the Institute's regulations. The author refused to sign the warning and a record in this respect was made on 27 January 1998.

4.3 On 10 February 1998, by order of the Dean of the Faculty of History, the author was reprimanded for infringement of the Internal Regulations. By order of the Rector of the Institute of 16 March 1998, Ms. Hudayberganova was excluded from the Institute. The order was grounded on the "rough immoral attitude toward a teacher and infringement of the internal regulations of the Institute, after numerous warnings". According to the State party, no cassation appeal was introduced against this decision. Her claim under the supervisory procedure (nadzornaya zhaloba) gave no result.

Issues and proceedings before the Committee

Consideration of admissibility

5.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

5.2 The Committee notes that the same matter is not being examined under any other international procedure and that domestic remedies have been exhausted. [No challenge from the State party to this conclusion has been received.] The requirements of article 5, paragraph 2 (a) and (b), of the Optional Protocol have thus been met.

5.3 The Committee has noted that the author has invoked article 19, of the Covenant, without however providing specific allegations on this particular issue, but limited herself to the mere enumeration of the above article. Therefore, the Committee concludes that the author has not substantiated this claim, for purposes of admissibility, and that this part of the communication is inadmissible under article 2 of the Optional Protocol.

5.4 As to the author's remaining claims under article 18 of the Covenant, the Committee considers that it has been sufficiently substantiated for purposes of admissibility, and decides to proceed to its examination on the merits.

Examination of the merits

6.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it, as required under article 5, paragraph 1, of the Optional Protocol.

6.2 The Committee has noted the author's claim that her right to freedom of thought, conscience and religion was violated as she was excluded from University because she refused to remove the headscarf that she wore in accordance with her beliefs. The Committee considers that the freedom to manifest one's religion encompasses the right to wear clothes or attire in public which is in conformity with the individual's faith or religion. Furthermore, it considers that to prevent a person from wearing religious clothing in public or private may constitute a violation of article 18, paragraph 2, which prohibits any coercion that would impair the individual's freedom to have or adopt a religion. As reflected in the Committee's general comment No. 22 (para. 5), policies or practices that have the same intention or effect as direct coercion, such as those restricting access to education, are inconsistent with article 18, paragraph 2. It recalls, however, that the freedom to manifest one's religion or beliefs is not absolute and may be subject to limitations, which are prescribed by law and are necessary to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others (article 18, paragraph 3, of the Covenant). In the present case, the author's exclusion took place on 15 March 1998, and was based on the provisions of the Institute's new regulations. The Committee notes that the State party has not invoked any specific ground for which the restriction imposed on the author would in its view be necessary in the meaning of article 18, paragraph 3. Instead, the State party has sought to justify the expulsion of the author from University because of her refusal to comply with the ban. Neither the author nor the State party have specified what precise kind of attire the author wore and which was referred to as "hijab" by both parties. In the particular circumstances of the present case, and without either prejudging the right of a State party to limit expressions of religion and belief in the context of article 18 of the Covenant and duly taking into account the specifics of the context, or prejudging the right of academic institutions to adopt specific regulations relating to their own functioning, the Committee is led to conclude, in the absence of any justification provided by the State party, that there has been a violation of article 18, paragraph 2.

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the Covenant, is of the view that the facts before it disclose a violation of article 18, paragraph 2, of the Covenant.

8. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Ms. Hudoyberganova with an effective remedy. The State party is under an obligation to take measures to prevent similar violations in the future.

9. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has

undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] The International Covenant on Civil and Political Rights entered into force for the State party on 1 September 1991 - date of its independence from the USSR, and the Optional Protocol entered into force for the State party on 28 September 1995 (accession).

[2] Article 1 of the law read as follows: "*Article 1. The aim of the present law is to ensure the right of every person to freedom of worship and religion, and the citizens equality irrespective of their religious convictions, and to regulate relations arising from religious organizations' activity.*"

Article 14 reads as follows: "*Article 14. Religious rites and ceremonies Religious organizations have a right to create and maintain facilities for free worship and carrying out religious rites, and to maintain pilgrimage sites. Worship, religious rites and ceremonies shall be exercised at a religious organization's premises, prayer buildings and other properties belonging to the organization, at pilgrimage sites, cemeteries, and in cases of ritual necessity and at citizens' will at home. Worship and religious rites can be exercised in hospitals, nursing homes, detention centers, prisons and labour camps at the request of the people staying there. Public worship and religious rites can be held outside religious buildings in the order established by the law of the Republic of Uzbekistan. Citizens of the Republic of Uzbekistan (except religious organization's ministers) cannot appear in public places in religious attire. Religious organizations cannot subject believers to compulsory payment of money, or taxation, and to actions insulting their honour and dignity.*"

APPENDIX

Individual opinion (dissenting) of Committee member Mr. Hipólito Solari Yrigoyen

My dissenting opinion regarding this communication is based on the following grounds:

In order to comply with the provisions of article 5, paragraph 1, of the Optional Protocol, the communication should be studied in the light of all the information supplied by the parties. In the present case, it is the author who has provided most of the information, although her statements fail to underpin her own allegations, and even contradict them.

According to the author (para. 2.4), she was excluded from the Tashkent State Institute for Eastern Languages by the Rector, after numerous warnings, on the following grounds:

1. Her negative attitude towards the teaching staff;

2. Her infringement of the regulations of the Institute.

Regarding her negative attitude towards the teachers, the decision of Mirabad district court revealed that the author had accused one of the teachers of bribery, claiming that he was offering pass marks in examinations in return for money. According to the State party (para. 4.3), she was excluded because of her "rough immoral attitude toward a teacher". The author has not supplied any information to justify her serious accusation against the teacher which would nullify the initial ground given for her expulsion. Nor has she explained any link between this ground for exclusion and the alleged violation of article 18 of the Covenant.

Regarding the infringement of the regulations of the Institute, which did not permit the wearing of religious clothing on Institute premises, the author states that she disagreed with the provisions because they "prohibited students from covering their faces" (para. 2.3). The State party points out that the internal regulations forbid students to wear clothes "attracting undue attention", and to circulate with the face covered (para. 4.2). Although the author and the State party do not specify which type of clothing the author was wearing, she states that she dressed "in accordance with the tenets of her religion". However, the author herself states that she complained to the Chairman of the Committee of Religious Affairs (Cabinet of Ministers), who "informed [her] that Islam does not prescribe a specific cult dress" (para. 2.8). The author has not rebutted this assertion, which she herself passed on.

Regarding the regulations of the university institute, it is necessary to bear in mind that academic institutions have the right to adopt specific rules to govern their own premises. It should also be added that these regulations applied to all students without exception, since the institution involved was a State institute of education, not a place of worship, and one in which the freedom to exercise one's own religion is subject to the need to protect the fundamental rights and freedoms of others, that is, religious freedom for all, safeguarded by the guarantee of equality before the law, whatever the religious convictions or beliefs of each individual student. It is not appropriate to request the State party to provide specific grounds for the restriction complained of by the author, since the regulations applied impose general rules on all students, and there is no restriction imposed on her alone or on the adherents of one religion in particular.

Furthermore, the exclusion of the author, according to her own statements, arose from more complex causes, and not only the religious clothing she wore or her demand to cover her face within the Institute.

For the reasons set out and in the light of the information supplied, I conclude that the author has not substantiated any of her allegations that she was victim of a violation of article 18 of the Covenant.

In accordance with article 5, paragraph 4, of the Optional Protocol, I consider that the facts in the present case do not reveal any violation of articles 18 and 19 of the Covenant.

(Signed): Hipólito Solari Yrigoyen

[Done in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Individual opinion of Committee member Sir Nigel Rodley

I agree with the finding of the Committee and with most of the reasoning in paragraph 6.2. I feel obliged, however, to dissociate myself from one assertion in the final sentence of that paragraph, in which the Committee describes itself as "duly taking into account the specifics of the context".

The Committee is right in the implication that, in cases involving such "clawback" clauses as those contained in articles 12, 18, 19, 21 and 22, it is necessary to take into account the context in which the restrictions contemplated by those clauses are applied. Unfortunately, in this case, the State party did not explain on what basis it was seeking to justify the restriction imposed on the author. Accordingly, the Committee was not in a position to take any context into account. To assert that it has done so, when it did not have the information on the basis of which it might have done so, enhances neither the quality nor the authority of its reasoning.

(*Signed*): Sir Nigel Rodley

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Individual opinion of Committee member Ms. Ruth Wedgwood

The facts of this case remain too obscure to permit a finding of violation of the Covenant. The author has complained to the Committee that she was prevented from wearing a "hijab" as a student at the Tashkent State Institute in Uzbekistan. "Hijab" is often rendered in translation as "headscarf" and may be nothing more than a scarf covering the hair and neck. But the author also wrote in her protest to the deans at the Tashkent Institute that she "disagreed with the provisions which prohibited students from covering their faces." Paragraph 2.3. The State party states that under Institute regulations, students are "forbidden to circulate with the face covered (with a hijab)." Paragraph 4.2.

Without further clarification of the facts by the author, it would thus seem that the manifestation of religious belief at issue in this case may involve the complete covering of a student's face in the setting of a secular educational institution. States parties have differed in their practice. Some countries permit any form of religious dress, including the covering of faces, accommodating women who otherwise would find it difficult to attend university. Other states parties have concluded that the purposes of secular education require some restrictions on forms of dress. A university instructor, for example, may wish to observe how a class of students is reacting to a lecture or seminar, or to establish eye contact in asking and responding to questions.

The European Court of Human Rights recently concluded that a secular university could restrict women students in the use of a traditional hijab, consisting of a scarf covering the hair and neck, because of the "impact" on other women students. See *Leyla Sahim v. Turkey*, No. 4477/98, decided 29 June 2004. The Court asserted that the "rights and freedoms of others" and the "maintenance of public order" were implicated, because a particular garb might cause other persons of the same faith to feel pressure to conform. The European Court observed that it "did not lose sight of the fact that "… extremist political movements in Turkey" sought "to impose on society as a whole their religious symbols and conception of a society founded on religious precepts."

Such interference with the manifestation of personal religious belief is problematic. But a state may be allowed to restrict forms of dress that directly interfere with effective pedagogy, and the covering of a student's face would present a different set of facts. The uncertain state of the record in this case does not provide the basis for adequate consideration of the issue, or even for a *sui generis* finding of violation.

(*Signed*): Ruth Wedgwood

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

F. Communication No. 945/2000, *Marik v. The Czech Republic* (Views adopted on 26 July 2005, eighty-fourth session)*

Submitted by:	Mr. Bohumir Marik (not represented by counsel)
Alleged victim:	The author
State party:	The Czech Republic
Date of initial communication:	8 October 1998 (initial submission)
Subject matter:	Non-restitution of confiscated property based on citizenship
Procedural issues:	Non-exhaustion of domestic remedies
Substantive issues:	Discrimination on grounds of citizenship
Articles of the Covenant:	26
Articles of the Optional Protocol:	5, paragraph 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 26 July 2005,

Having concluded its consideration of communication No. 945/2000, submitted to the Human Rights Committee on behalf of Mr. Bohumir Marik under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Bohumir Marik, a United States and Czech citizen, born in Plzen, Czechoslovakia, currently residing in the United States. The author claims to be a victim of a violation by the Czech Republic[1] of article 26 of the International Covenant on Civil and Political Rights (the Covenant). He is not represented by counsel.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Factual background

2.1 In 1969, the author emigrated from Czechoslovakia to the United States with his family. He later became a United States citizen. In 1972, he was convicted of fleeing the country by the Plzen District Court; his property was confiscated, inter alia his two houses in Letkov and in Plzen.

2.2 On 23 April 1990, the Czech and Slovak Republic passed Act No. 119/1990 Coll. on Judicial Rehabilitation, which rendered null and void all sentences handed down by Communist courts for political reasons. Persons whose property had been confiscated were, under section 23.2 of the Act, eligible to recover their property, subject to conditions to be spelled out in a separate restitution law.

2.3 On 1 February 1991, Act 87/1991 on Extra-Judicial Rehabilitation was adopted. Under it, a person claiming restitution of property had to (a) be a Czech-Slovak citizen and (b) be a permanent resident in the Czech Republic to claim entitlement to regain his or her property. In addition, according to the Act, (c) the claimant has a burden for proving the unlawfulness of the acquisition by the current owner of the property in question. The first two requirements had to be fulfilled during the time period in which restitution claims could be filed, between 1 April and 1 October 1991. A judgement of the Czech Constitutional Court of 12 July 1994 (No. 164/1994), however, annulled the condition of permanent residence and established a new time frame for the submission of restitution claims by persons who had thereby become entitled persons, running from 1 November 1994 to 1 May 1995. According to the author, this judgement established a right to restitution which could be exercised by those who did not have permanent residence in the country and met the citizenship condition in the new time period. However, the Supreme Court and the Constitutional Court supported an interpretation to the effect that the newly entitled persons were persons who, during the original period of time (1 April to 1 October 1991), had met all the other conditions, including the citizenship condition, with the exception of permanent residence. Although the author claims that he never lost Czech citizenship, he formally became Czech citizen again in May 1993.

2.4 In 1994, the author filed two separate restitution claims with regard to his houses in Letkov and Plzen. In the first case (the Letkov property), the Plzen-mesto District Court refused the restitution claim on 13 November 1995, because the author did not fulfil the citizenship requirement during the initial period open for restitution claims, i.e. 1 October 1991 at the latest. It also found that the third requirement for restitution, concerning the unlawfulness of the current owners acquisition, was not met in the case. This decision was confirmed by the Plzen Regional Court on 25 March 1996. The author's appeal to the Supreme Court was dismissed on 20 August 1997 on the ground that he did not fulfil the precondition of citizenship in 1991. The judgement confirmed that the new established time frame did not change this original requirement but gave non-residents additional time to lodge their restitution claims. It did not consider the other requirements. A further appeal to the Constitutional Court was rejected on 12 May 1998.

2.5 In the second case (the Plzen property), the Plzen-mesto District Court dismissed the author's restitution claim on 22 September 1995, because he did not fulfil the condition of Czech citizenship in 1991. The Regional Court confirmed this decision on 20 December 1995.

The author's appeal to the Supreme Court was declared inadmissible on 26 September 1996, and an appeal to the Constitutional Court was dismissed on procedural grounds on 7 October 1998. The author thus contends to have exhausted all domestic remedies.

The complaint

3. The author claims to be a victim of a violation of article 26 of the Covenant, as the citizenship requirement of Act 87/1991 constitutes unlawful discrimination. He invokes the jurisprudence of the Committee in the cases of *Simunek v. The Czech Republic*[2] and *Adam v. The Czech Republic*,[3] where it found that the requirement of citizenship in Act 87/1991 was unreasonable, and that its effects constituted a violation of article 26 of the Covenant.

The State party's submission on the admissibility and merits of the communication

4.1 On 8 July 2003, the State party commented on the admissibility and merits of the communication. On a factual issue, it points out that the author did not lose his past Czechoslovak citizenship by any decision of the former Czechoslovak Republic, but under a bilateral international treaty, the Treaty of Naturalisation of 16 July 1928 between the Czechoslovak Republic and the United States of America, which remained in force until 1997. Under this treaty, the author automatically lost his Czechoslovak citizenship upon acquiring United States citizenship. Despite this treaty, however, since 1990, those who desired to acquire Czech citizenship had an opportunity to do so on the basis of filing the relevant application. The author, who filed his application in 1992, became a Czech citizen on 20 May 1993. However, from the time he acquired United States citizenship until 20 May 1993, he was not a Czech citizen.

4.2 The State party underlines that Act No. 87/1991, in addition to the citizenship and permanent residence requirements, laid down other conditions that had to be met by claimants in order for them to be successful with their restitution claims. In particular, for protecting the current owners of property that is subject to a restitution claim, the Act stipulated that the current owner had to surrender property only if he/she had obtained said property in breach of the laws then in force or if he/she had obtained it through unlawful preferential treatment. The burden of proof was on the claimant. In the case of the restitution claim of the property in Letkov, the domestic courts held that the author had not proven that the current owners had acquired his property unlawfully. The author thus failed to fulfil this condition, in addition to not holding Czech citizenship in 1991. The State party argues that in this case, the author would not have been successful in his restitution claim even if the citizenship condition had not existed.

4.3 The State party further argues that the part of the communication which deals with the property in Plzen is inadmissible for failure to exhaust domestic remedies. The purpose of article 5, paragraph 2 (b) of the Optional Protocol is to provide States parties with an opportunity to rule out or remedy alleged violations of the Covenant before such allegations are submitted to the Committee. The complainants must further observe statutory deadlines laid down in the law while availing themselves of domestic remedies. In the case of the property in Plzen, although the author did file a constitutional appeal, he did so after the expiry of the deadline for filing such an appeal.

4.4 The State party did not contest the admissibility of that part of the communication dealing with the property in Letkov.

4.5 On the merits, the State party indicates that its restitutions laws, including Act 87/1991, were designed to achieve two objectives. The first was to mitigate the consequences of injustices which occurred during the communist regime, while being aware that these injustices can never be remedied in full. The other was to enable a rapid implementation of comprehensive economic reform, in the interest of establishing a functioning market economy. The citizenship condition was included in the law to incite owners to take good care of the property after the privatization process.

4.6 According to the State party, the author had the opportunity to acquire Czech citizenship in 1990 and 1991; he deprived himself of the opportunity to meet the citizenship requirement during the period open for restitution claims, by applying for citizenship only in 1992.

Issues and proceedings before the Committee

Consideration of admissibility

5.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

5.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for purposes of article 5, paragraph 2 (a), of the Optional Protocol.

5.3 With respect to the requirement of exhaustion of domestic remedies, the Committee notes that the State party has challenged the admissibility of the part of the communication relating to the property in Plzen. The Committee recalls that only such remedies have to be exhausted which are both available and effective. The Committee notes that although the author failed to file a constitutional complaint within the 60 days time limit set by the law in the case of the property in Plzen, the author did file such a complaint for the restitution of the property in Letkov. The Committee recalls its relevant jurisprudence[4] and notes that the author's constitutional claim on the property in Letkov was rejected on 12 May 1998; that other claimants in similar situations have unsuccessfully challenged the constitutionality of Act 87/1991; and that earlier Views of the Committee[5] have remained unimplemented. The Committee considers that, in the absence of legislation enabling the author, who did not hold Czech citizenship in 1991, to claim restitution, a constitutional motion filed within the statutory deadlines in the author's case would not have offered him a reasonable chance of obtaining effective redress and therefore would not have constituted an effective remedy for the purpose of article 5, paragraph 2 (b), of the Optional Protocol.

5.4 The Committee notes that the State party has not contested the admissibility of the part of the communication relating to the restitution of the property in Letkov. It therefore decides that the communication is admissible in relation to both properties, inasmuch as it appears to raise issues under article 26 of the Covenant, and proceeds to its examination on the merits.

Consideration of the merits

6.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

6.2 The issue before the Committee is whether the application to the author of Act 87/1991 amounted to a violation of his right to equality before the law and to equal protection of the law, contrary to article 26 of the Covenant.

6.3 The Committee reiterates its jurisprudence that not all differentiations in treatment can be deemed to be discriminatory under article 26. A differentiation which is compatible with the provisions of the Covenant and is based on objective and reasonable grounds does not amount to prohibited discrimination within the meaning of article 26.[6] Whereas the citizenship criterion is objective, the Committee must determine whether its application to the author was reasonable in the circumstances of the case.

6.4 The Committee recalls its Views in the cases of *Simunek*, *Adam*, *Blazek* and *Des Fours Walderode*,[7] where it held that article 26 of the Covenant had been violated: "the authors in that case and many others in analogous situations had left Czechoslovakia because of their political opinions and had sought refuge from political persecution in other countries, where they eventually established permanent residence and obtained a new citizenship. Taking into account that the State party itself is responsible for the author's ... departure, it would be incompatible with the Covenant to require the author … to obtain Czech citizenship as a prerequisite for the restitution of [his] property or, alternatively, for the payment of appropriate compensation".[8] The Committee further recalls its jurisprudence[9] that the citizenship requirement in these circumstances is unreasonable. In addition, the State party's argument that the citizenship condition was included in the law to incite owners to take good care of the property after the privatization process has not been substantiated.

6.5 The Committee considers that the precedent established in the above cases also applies to the author of the present communication. The Committee notes that in the case of the Letkov property, the State party argues that the author did not fulfil the third requirement, i.e. proving that the property was acquired unlawfully by the present owners. However, the Committee further notes that although the lower courts took this element into consideration, the Supreme Court based its decision only on the non-fulfilment of the citizenship precondition. In the light of these considerations, the Committee concludes that the application to the author of Act 87/1991, which lays down a citizenship requirement for the restitution of confiscated property, violated his rights under article 26 of the Covenant.

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of article 26 of the International Covenant.

8. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, which may be compensation, and in the case of the Plzen property, restitution, or, in the alternative compensation. The Committee reiterates that the State party should review its legislation to ensure that all persons enjoy both equality before the law and equal protection of the law.

9. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not, and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] The Covenant was ratified by Czechoslovakia in December 1975 and the Optional Protocol in March 1991. The Czech and Slovak Federal Republic ceased to exist on 31 December 1992. On 22 February 1993, the Czech Republic notified its succession to the Covenant and the Optional Protocol.

[2] See communication No. 516/1992, *Simunek v. The Czech Republic*, Views adopted on 19 July 1995, paras. 11.6 and 11.8

[3] See communication No. 586/1994, *Adam v. The Czech Republic*, Views adopted on 23 July 1996, paras. 12.5 and 12.8

[4] See communication No. 586/1994, *Adam v. The Czech Republic*, Views adopted on 23 July 1996, para. 6.5 and 11.2 and communication No. 857/1999, *Blazek v. The Czech Republic*, Views adopted on 12 July 2001, para. 5.3.

[5] See communication No. 516/1992, *Simunek v. The Czech Republic*, Views adopted on 19 July 1995, communication No. 586/1994, *Adam v. The Czech Republic*, Views adopted on 23 July 1996, communication No. 857/1999, *Blazek v. The Czech Republic*, Views adopted on 12 July 2001 and communication No. 747/1997, *Des Fours Walderode v. The Czech Republic*, Views adopted on 30 October 2001.

[6] See communication No. 182/1984, *Zwaan-de Vries v. The Netherlands*, Views adopted on 9 April 1987, para. 13.

[7] See footnote 8.

[8] See communication No. 586/1994, *Adam v. The Czech Republic*, Views adopted on 23 July 1996, para. 12.6 and communication No. 857/1999, *Blazek v. The Czech Republic*, Views adopted on 12 July 2001, para. 5.8.

[9] See communication No. 516/1992, *Simunek v. The Czech Republic*, Views adopted on 19 July 1995, para. 11.6.

G. Communication No. 968/2001, *Jong-Choel v. The Republic of Korea* (Views adopted on 27 July 2005, eighty-fourth session)*

Submitted by:	Kim Jong-Cheol (represented by counsel, Mr. Cho Yong-Whan, of the Horizon Law Group, Seoul)
Alleged victim:	The author
State party:	Republic of Korea
Date of communication:	31 January 2000 (initial submission)
Subject matter:	Criminal conviction of journalist for having published opinion poll results prior to election.
Procedural issues:	None
Substantive issues:	Right to freedom of expression
Articles of the Covenant:	19, paragraph 2 and 3, 25 (a) and (b) and 26
Articles of the Optional Protocol:	1

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 27 July 2005,

Having concluded its consideration of communication No. 968/2001, submitted to the Human Rights Committee on behalf of Kim Jong-Cheol under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

An individual opinion signed jointly by Committee members Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Ahmed Tawfik Khalil and a separate opinion signed by Committee member Ms. Ruth Wedgwood are appended to the present document.

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Mr. Kim Jong-Cheol, a Korean national. He claims to be a victim of violations by the Republic of Korea of his rights under articles 19, paragraph 2, 25 (a) and (b), and 26 of the International Covenant on Civil on Civil and Political Rights. He is represented by counsel.

Factual background

2.1 On 11 December 1997, the author, a journalist, published an article in a national weekly publication, reporting on opinion polls, between 31 July and 11 December 1997, for the Presidential election of 18 December 1997. In February 1998, he was charged by the District Attorney for violating section 108 (1) of the Election for Public Office and Election Malpractice Prevention Act (hereinafter the "Election Act"), which prohibits publication of public opinion polls during the electoral campaign period.[1] According to article 33 (1), the presidential campaign period is 23 days. The Election Act imposes criminal liability for the disclosure of political opinion polls for the 23-day period running up to and including election day.[2] On 16 July 1998, the author was found guilty as charged by the Seoul Criminal District Court Collegiate Division and fined 1,000,000 won (approx. US$ 445).

2.2 The author appealed this decision and at the same time challenged the constitutionality of the related provisions of the Election Act before the Constitutional Court. On 28 January 1999, the Constitutional Court declared the relevant provisions of the Election Act constitutional, finding that the length of the ban suppressing the publication of polls during the electoral campaign period was reasonable to ensure a fair and undistorted election result. In its judgement, it referred to a study which allegedly demonstrates that a public opinion poll may encourage voters to move toward a candidate with a stronger chance of winning (so-called "bandwagon effect"), or may add sympathy votes to the underdog (so-called "underdog effect"), thereby distorting the will of voters. On 13 April 1999, the High Court upheld the District Court's decision, and on 20 August 1999, the Supreme Court dismissed the author's appeal.

The complaint

3.1 The author claims that his conviction violates articles 19, paragraph 2, and 25 (a) and (b) of the Covenant. He contends that the ban on the publication of polling results during the campaign period has not been shown to promote fair elections, as the Constitutional Court simply speculated that publication of polls could swing votes both towards and away from particular candidates. The Constitutional Court's reasoning is based primarily on an unsubstantiated academic theory (the "bandwagon" and "underdog" effects) and cannot be invoked to deprive the author of his right to freedom of expression and provision of information based on such an uncertain "theory". In fact, according to the Constitutional Court's own reasoning, the two possible adverse effects may theoretically cancel each other out.

3.2 The author considers that, as a journalist, article 19 guarantees him the right to discharge his professional duty, by reporting pertinent news information to the reader. His duty to report is a prerequisite to the public right to access information and the particular ban is an excessive and disproportionate restriction.

3.3 The author claims that section 108 (1) of the Election Act violates article 25 (a) and (b), as it denies the free and full exchange of information, which is vital to voters in forming their will meaningfully. Results of reliable public opinion polls provide relevant and meaningful information of interest to voters. By being informed of the candidates' prospective standing in an election, voters may freely form or modify their own opinion about the candidates.

3.4 The author argues that the ban unreasonably discriminates between persons with direct access to polls (taking polls itself not being unlawful) and those who do not have such access, and that this leads to distortions in the forming of voter will. He contends that as readily-accessible foreign media are not restricted in the publication of poll data, the ban serves no effective purpose. Finally, he argues that the State party has not demonstrated any negative effect on the election caused by the author's publication, and that accordingly his punishment was unjustified.

3.5 The author states that the matter has not been submitted to another procedure of international investigation or settlement and that he has exhausted domestic remedies.

State party's submission on admissibility and merits and author's comments thereon

4.1 On 22 February 2002, the State party provided its submission on admissibility and merits. It invokes to the Constitutional Court's decision, which considered that restrictions on the publication of public opinion poll information for the time necessary to guarantee a fair election does not constitute a violation of either the Constitution or the Covenant. It refers to article 37 (2) of the Constitution, which provides that the freedoms and rights of citizens may be restricted by law only when this is essential for national security, maintenance of order or public welfare, as well as article 19, paragraph 3 of the Covenant. It argues that the guarantee of fair elections is an integral part of public order in a democratic society. The length of the period of restriction cannot be considered as excessive or discriminatory.

4.2 The State party submits that the Constitutional Court's reasoning is not based on theory or possibility, but on the country's own experience. It takes into account how vulnerable the election culture and climate have been to political manipulation and irregularities in the Republic of Korea in the past. Unfairly or partially-manipulated public opinion poll results released prior to an election have often affected the choices of voters, thus jeopardizing a fair election. Nevertheless, the State party submits that over time, once the political climate has matured, the ban on the publication of public opinion poll results could be lifted.

5. On 31 July 2003, the author commented on the State party's submission, stating that there is no connection between his reporting of the public opinion polls and the so called, "political manipulation and irregularities" concerning the election, and that it was the government itself that was responsible for creating an the "election culture and climate" that was "vulnerable to political manipulation and irregularities". In his view, such manipulation was made possible partly because the government had imposed restrictions on the freedom of expression and free access to information in relation to elections. The State party has not explained what kind of harm the author had caused by reporting the results of the poll and how

the ban was related to the desire to ensure a fair election. It also did not make the necessary connection between the punishment of the author and the grounds on the restriction of the right to freedom of expression stipulated in the Covenant.

State party's supplementary submission

6.1 By submission of 28 June 2004, the State party recalls that the Election Act is designed to ensure that public elections are fairer by preventing them from being adversely affected by biased or manipulated public opinion polls, thereby influencing voters with incorrect information. Even if conducted in a fair and objective manner, such polls can influence voters through the "bandwagon" and "underdog" effects.

6.2 While acknowledging that abuse of power by some political actors has in the past undermined the quest for fair elections, the State party denies that the government is responsible for the current election culture. Today's media has grown in terms of social and political power that has crucial effects on opinion making, especially on elections. Under the Election Law, the Government has a legal duty to improve the electoral culture by preventing interference with the election outcomes by publication of incorrect opinion poll results by the media. Finally, it submits that it does not have to prove the harm done by the publication of public opinion polls in each individual case to justify enforcement of the law.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the complaint is admissible under the Optional Protocol to the Covenant.

7.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a) of the Optional Protocol. With respect to the exhaustion of domestic remedies, the Committee notes that the State party has not claimed that there are any domestic remedies that have not been exhausted or could be further pursued by the author.

7.3 As to the author's claims under articles 25 (a) and (b), and 26 of the Covenant, the Committee considers that the author has insufficiently substantiated these claims for the purposes of admissibility. Thus, it finds these claims inadmissible under article 2 of the Optional Protocol. The Committee proceeds immediately to the consideration of the merits as it relates to the claim under article 19 of the Covenant.

Consideration of the merits

8.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

8.2 The Committee notes that the issue before it is whether the author's conviction, under section 108 (1) of the Election for Public Office and Election Malpractice Prevention Act, for having published an article on the results of opinion polls during the campaign period of the Presidential election, violates article 19, paragraph 2, of the Covenant. Article 19, paragraph 2, of the Covenant guarantees the right to freedom of expression and includes "freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media". The Committee considers that through his articles, the author was exercising his right to impart information and ideas within the meaning of article 19, paragraph 2, of the Covenant.

8.3 The Committee observes that any restriction of the freedom of expression pursuant to paragraph 3 of article 19 must cumulatively meet the following conditions: it must be provided for by law, it must address the aims enumerated in paragraph 3 of article 19, and must be necessary to achieve the purpose. The restrictions were provided for by law, under section 108 (1) of the Election for Public Office and Election Malpractice Prevention Act. As to whether the measures addressed one of the aims enumerated in paragraph 3, the Committee notes that the State party maintains that the restriction is justified in terms of the protection of public order (para. 3 (b)). The Committee considers that, to the extent that the restriction relates to the rights of Presidential candidates, this restriction may also fall within the terms of article 19, paragraph 3 (a) (necessary for the respect of the rights of others). The Committee notes the underlying reasoning for such a restriction is based on the wish to provide the electorate with a limited period of reflection, during which they are insulated from considerations extraneous to the issues under contest in the elections, and that similar restrictions can be found in many jurisdictions. The Committee also notes the recent historical specificities of the democratic political processes of the State party, including those invoked by the State party. Under such circumstances, a law restricting the publication of opinion polls for a limited period in advance of an election does not seem ipso facto to fall outside the aims contemplated in article 19, paragraph 3. As to the issue of proportionality, the Committee notes that, while a cut-off date of 23 days prior to the election is unusually long, it need not pronounce itself on the compatibility per se of the cut-off date with article 19, paragraph 3, since the author's initial act of publishing previously unreported opinion polls took place within seven days of the election. The author's conviction for such publication cannot be considered excessive in the context of the conditions obtaining in the State party. The Committee also notes that the sanction visited on the author, albeit one or criminal law, cannot be categorized as excessively harsh It is not, therefore, in a position to conclude that the law, as applied to the author, is disproportionate to its aim. Accordingly, the Committee does not find a violation of article 19 of the Covenant in this regard.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it do not disclose a violation of the International Covenant on Civil and Political Rights.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] It stipulates that "No person may publish or quote in a report the details and result of a public opinion poll (including a mock voting or popularity poll) making a degree of support to a political party or a successful candidate anticipated, in connection with an election, from the day the election period commences to the time the voting is closed on the election day."

[2] According to article 256 (1), as amended, "any person who discloses the details and result of a survey of public opinion, or makes a report citing them or makes another person do so, in contravention of the provisions of article 108 (1) … with imprisonment for not more than two years, or a fine not exceeding four million won."

APPENDIX

Individual opinion (dissenting) of Committee members, Ms. Christine Chanet and Messrs. Abdelfattah Amor, Prafullachandra Natwarlal Bhagwati, Alfredo Castillero Hoyos, Ahmed Tawfik Khalil and Rajsoomer Lallah

We observe that any restriction of the freedom of expression pursuant to paragraph 3 of article 19 must cumulatively meet the following conditions: it must be provided for by law, it must address one of the aims enumerated in paragraph 3 (a) and (b) of article 19, and must be necessary to achieve a legitimate purpose. While the State party has stated that the restrictions in this case were justified in order to protect public order and were provided for by law, under section 108 (1) of the Election for Public Office and Election Malpractice Prevention Act, we do not consider that the measures taken against the author were necessary for the purpose stated. We note that the State party has invoked public order by reference to the desire to ensure free and fair elections and the fear that the media may manipulate public opinion by publishing inaccurate opinion poll results. It has also referred to a desire to avoid feared "bandwagon" or "underdog" effects on the electorate. We consider however that the State party has failed to demonstrate the reality of the threat which it contends the exercise of the author's freedom of expression posed; nor has it explained why its electorate should be deprived of information that could help them ensure an electoral outcome most consistent with their overall political preferences. We also note that the alleged "bandwagon" and "underdog" effects are mutually contradictory, and further stress the unusually long period of 23 days required by the law. We conclude that the arguments advanced by the State party are insufficient to make the restriction of the author's right to freedom of expression compatible with paragraph 3 of article 19. Accordingly, we consider that the facts before the Committee, disclose a violation of article 19, paragraph 2, of the Covenant.

(*Signed*): Ms. Christine Chanet

(*Signed*): Mr. Abdelfattah Amor

(*Signed*): Mr. Prafullachandra Natwarlal Bhagwati

(*Signed*): Mr. Alfredo Castillero Hoyos

(*Signed*): Mr. Ahmed Tawfik Khalil

(*Signed*): Mr. Rajsoomer Lallah

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Individual opinion (dissenting) of Committee member Ms. Ruth Wedgwood

I join six of my colleagues on the Human Rights Committee in concluding that South Korea's criminal statute banning the publication of political polling data during an election campaign is inconsistent with article 19 of the Covenant on Civil and Political Rights.

South Korea's "Election Malpractice Prevention Act" forbids publishing or quoting the "results" of public opinion polls, and any details of the polls, during the entire interval of a political campaign. Thus, throughout the 23-day campaign period for the South Korean presidency, no writer or political analyst may speculate which candidate is ahead or behind, or which party's political platform is winning the approbation of the public, if this characterization is based on any attempt to sample the views of voters.

This muzzles what citizens can say and write, as well as the free expression of journalists. The statute restricts what a political party could say about the scope of its public support, and applies to local campaigns as well as national contests. The absence of any definition of a "poll" would apparently forbid even a mock election among members of a local soccer club. This limit on writing and speech is especially harsh, because it is punishable by imprisonment for up to two years, though here the criminal penalty applied was a monetary fine.

Some might welcome an interval in which elections were not discussed as a horse race. But the complete ban for the duration of a campaign of any polling about political candidates and political parties also hobbles the ability to discuss issues and controversies. The prohibition means that no journalist could discuss on national radio or mention in a newspaper column that, based on public opinion sampling, a particular candidate appears to have gained support in a contest and that such support was tied to the candidate's views on an issue of the day.

The State party has argued that election polls may be "incorrect" and that the media has "growing power," and seeks to justify the ban as a way of protecting "public order." See paragraph 6.2 supra. But public opinion polls may also be seen as part of the conversation between candidates and citizens. They can provide one of the safeguards for honest elections in both emerging and established democracies. And in any event, under article 19 of the Covenant, citizens enjoy the right to "hold opinions without interference," the right to "freedom of expression," and the right to "seek, receive and impart information and ideas of all kinds, … either orally, in writing, or in print."

The State party has not shown that its flat ban on any published sampling of the evolving views of voters is a justifiable restriction in light of the Covenant's broad guarantee of freedom of expression.

In a challenge to the statute before the Constitutional Court of South Korea, a "contending" judge noted that "the freedom to exchange opinions is an absolute precondition to the system of Democracy." That prescient statement is reflected in the Covenant as well.

(*Signed*): Ms. Ruth Wedgwood

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

H. Communication No. 971/2001, *Arutyuniantz v. Uzbekistan* (Views adopted on 30 March 2005, eighty-third session)*

Submitted by:	Irina Arutyuniantz (not represented by counsel)
Alleged victim:	Vazgen Arutyuniantz, the author's son
State party:	Uzbekistan
Date of communication:	18 December 2000 (initial submission)
Subject matter:	Conviction based on testimony of alleged accomplice; failure of court positively to determine who the murderer(s) was
Substantive issues:	Presumption of innocence
Procedural issues:	None
Articles of the Covenant:	14 (2)
Articles of the Optional Protocol:	4 (2), 5 (2) (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 30 March 2005,

Having concluded its consideration of communication No. 971/2001, submitted to the Human Rights Committee on behalf of Vazgen Arutyuniantz under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Ahmed Tawfik Khalil, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, and Mr. Roman Wieruszewski.

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author is Irina Arutyuniantz, a citizen of Uzbekistan born in 1952. She submits the communication on behalf of her son, Vazgen Arutyuniantz, also an Uzbek citizen, born 1977, currently imprisoned in the city of Andijan in Uzbekistan. She claims that her son is a victim of violations by Uzbekistan of articles 6, 7, 14 paragraphs 2, 3 (g) and 16 of the International Covenant on Civil and Political Rights.[1] She is not represented by counsel.

1.2 The Covenant and the Optional Protocol entered into force for Uzbekistan on 28 December 1995.

Factual background

2.1 On 31 May 2000, Vazgen Arutyuniantz and another man, Armen Garushyantz, were convicted in the Military Court in Tashkent[2] of the aggravated murder of two people and of burgling their apartments; they were sentenced to death. The Court found that in January 1999, the two men had visited the apartment of one of the victims, to whom they owed money, and killed her by striking her with a hammer, and then burgled her apartment. It found that in March 1999, the pair had also killed another man by striking him several times on the head with a hammer, and then burgled his apartment. The author states that her son admitted to being present at the scene of each of the two murders, and to robbery, but maintains his innocence in relation to the two murders.

2.2 The author states that her son's trial was unfair and that he was unjustly convicted of murder. His conviction was based on the testimony of his alleged accomplice, Garushyantz, who changed his testimony several times. When he was arrested, Garushyantz said that Arutyuniantz, who then was still at large, had committed the two murders. After Arutyuniantz was apprehended, Garushyantz admitted that he had lied about Arutyuniantz committing the murders, in the hope that Arutyuniantz would not be apprehended and therefore offer no contradictory testimony. Then in Court, fearing a possible death sentence, Garushyantz again changed his testimony, this time claiming that Arutyuniantz had killed the first victim, but that he had killed the second. Despite these inconsistencies, the testimony of Garushyantz was the basis of her son's conviction for murder.

2.3 The author states there was no evidence and no judicial conclusion as to whether it was in fact Arutyuniantz or his accomplice who killed one or both of the victims, despite the requirements of Supreme Court Order Number 10, which requires that in cases of crimes allegedly committed by a group of people, the Court must ascertain who played what role in the crime. The decision of the court simply states that "*Garushyantz and Arutyuniantz struck (the victims) with a hammer*", and there was no consideration of precisely who struck the blows with the hammer. The author claims that in such circumstances her son's right to be presumed innocent until proved guilty was violated. The author states that the Court approached the trial with a predisposition towards conviction, and that it upheld each and every accusation levelled against her son under the Criminal Code, even though some plainly had no application. Thus, her son was charged with the killing of two or more persons under article 97 of the Criminal Code which, according to the author, only applies where the murders in question occur simultaneously. She further claims that there was no evidence of the murders being committed in aggravating circumstances, as found by the Court. She submits that the Court's decision simply replicated the indictment, and that this is further indication of the Court's lack of objectivity.

2.4 The author states that her son was severely beaten after his arrest by the police for the purpose of extracting a confession about his alleged participation in the murders. That her son was beaten was established by a medical examination conducted by the Ministry of Defence on 12 July 1999. She notes that after her husband went to visit her son in detention, he came back in a state of shock, as her son was black from bruising. He told his father that his kidneys were very sore, he was urinating blood, had headaches and was unable to stand on his heels. The investigator allegedly told her husband that their son was a murderer and that he would be shot. In a message sent to his parents from his cell, he implored them to help him, and said that he was being beaten, but refused to confess because he was not a murderer. The author states that in October 1999, in despair over his son's situation, her husband committed suicide.

2.5 Mr. Arutyuniantz appealed to the Supreme Court complaining about the above matter, with the exception of the allegation of being severely beaten. On 6 October 2000, the appeal against his murder conviction was dismissed.

The complaint

3. The author claims that her son's trial and ill-treatment whilst in custody gives rise to violations of articles 6, 7, 14 paragraphs 2 and 3 (g), and article 16 of the Covenant.

The State party's observations on admissibility and merits

4.1 By note dated 13 January 2005, the State party submitted that on 28 December 2001, the Supreme Court issued an order commuting Arutyuniantz's death sentence to a term of 20 years' imprisonment. Further to presidential 'amnesty decrees' dated 28 December 2000, 22 August 2001 and 3 December 2002, Mr. Arutyuniantz's sentence was reduced to 9 years, 4 months and 22 days; he was not eligible to benefit from further amnesty decrees issued on 1 December 2003 and 1 December 2004, because he had violated prison rules.

4.2 The State party submits that the preliminary investigation into the crimes for which Mr. Arutyuniantz was convicted was conducted in accordance with the Uzbek Criminal Procedure Code, and that all charges and evidence were thoroughly assessed. It submits that Arutyuniantz's guilt was found to be substantiated, and contends that the communication is both inadmissible and without merit.

Issues and proceedings before the Committee

5.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the case is admissible under the Optional Protocol to the Covenant.

5.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

5.3 The Committee notes that the author's claim under article 16 has not been substantiated, as there is no information on file which suggests that the author's son was denied recognition as a person before the law. Further, in view of the commutation of Mr. Arutyuniantz's death sentence, there is no longer any factual basis for the author's claim under article 6 of the Covenant. Accordingly, the Committee finds that these claims have not been substantiated, and are therefore inadmissible under article 2 of the Optional Protocol.

5.4 In relation to the author's claims that her son's rights under articles 7 and 14, paragraph (3) (g) were violated, the Committee notes that these matters were not raised by the author's son in his appeal to the Supreme Court. The Committee has not been provided with any information to the effect that the author complained about his alleged mistreatment at the hands of the police to the State party's authorities. The Committee reiterates that the requirement that an author exhaust domestic remedies attaches to each allegation of an alleged violation of the Covenant, not simply to the decision of a court or tribunal unfavourable to an author. Accordingly, the Committee considers that the author's claims in relation to violations of articles 7 and 14, paragraph (3) (g) of the Covenant are inadmissible under article 5, paragraph (2) (b) of the Optional Protocol.

5.5 The Committee considers there to be no impediment to the admissibility of the author's remaining claim under article 14 (2), and proceeds to consider it on the merits.

Consideration of the merits

6.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided under article 5, paragraph 1, of the Optional Protocol. It notes that, whilst the State party has provided comments on the author's case and conviction, including information about the commutation of the death sentence, it has not provided any information about the claims made by the author. The State party merely contends that Mr. Arutyuniantz was tried and convicted in compliance with Uzbek laws, that the charges and evidence were thoroughly assessed, that his guilt was proved, and that the communication is both inadmissible and without merit.

6.2 In relation to the author's claim that her son was not presumed innocent until proved guilty, the author has made detailed submissions which the State party has not addressed. The Committee recalls that it is implicit in article 4, paragraph 2, of the Optional Protocol that a State party should examine in good faith all allegations brought against it, and should provide the Committee with all relevant information at its disposal. The Committee does not consider that a general statement about the adequacy of the criminal proceedings in question meets this obligation. In such circumstances, due weight must be given to the author's allegations, to the extent that they have been substantiated.

6.3 The author points to a number of circumstances which she claims demonstrate that her son did not benefit from the presumption of innocence. She states that her son's conviction was based on the testimony of an accomplice who changed his evidence on several occasions, and who at one point confessed to the having committed the murders himself and having falsely implicated Arutyuniantz. She also states that the trial court never made a positive finding of who murdered the two victims; the decision refers to both accused striking and killing the victims with a single hammer.

6.4 The Committee also recalls its general comment No. 13, which reiterates that by reason of the principle of presumption of innocence, the burden of proof for any criminal charge is on the prosecution, and the accused must have the benefit of the doubt. His guilt cannot be presumed until the charge has been proved beyond reasonable doubt. From the information before the Committee, which has not been challenged in substance by the State party, it transpires that the charges and the evidence against the author left room for considerable doubt. Incriminating evidence against a person provided by an accomplice charged with the same crime should, in the Committee's opinion, be treated with caution, particularly in circumstances where the accomplice has changed his account of the facts on several occasions. There is no information before the Committee that, despite their having being raised by the author's son, the trial court or the Supreme Court took these matters into account.

6.5 The Committee is mindful of its jurisprudence that it is generally not for itself, but for the courts of States parties, to review or to evaluate facts and evidence, or to examine the interpretation of domestic legislation by national courts and tribunals, unless it can be ascertained that the conduct of the trial or the evaluation of facts and evidence or interpretation of legislation was manifestly arbitrary or amounted to a denial of justice.[3] For the reasons set out above, the Committee considers that the author's trial in the present case suffered from such defects.

6.6 In the absence of any explanation from the State party, the above concerns raise considerable doubt as to the author's son's guilt in relation to the murders for which he was convicted. From the material available to it, the Committee considers that Mr. Arutyuniantz was not afforded the benefit of this doubt in the criminal proceedings against him. In the circumstances, the Committee concludes that the author's trial did not respect the principle of presumption of innocence, in violation of article 14 (2).

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose violations of article 14 (2) of the Covenant.

8. Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee considers that the author is entitled to an appropriate remedy, including compensation and either his retrial or his release.

9. By becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not; pursuant to article 2 of the Covenant, the State party has undertaken to ensure all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant, and to provide an effective and enforceable remedy in cases where a violation has been established. The Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] The Covenant and the Optional Protocol entered into force for the State party on 28 December 1995.

[2] It transpires from the file that the author's co-defendant had been in the armed services until 1998, when he deserted; no particular claim was made by the author on the fact that her son was judged by a Military Court.

[3] See communication No. 842/1998, *Romanov v. Ukraine*, inadmissibility decision of 30 October 2003.

I. Communication No. 973/2001, *Khalilov v. Tajikistan* (Views adopted on 30 March 2005, eighty-third session)*

Submitted by:	Mrs. Maryam Khalilova (not represented by counsel)
Alleged victim:	Mr. Validzhon Alievich Khalilov (author's son)
State party:	Tajikistan
Date of initial communication:	14 May 2001 (initial submission)
Subject matter:	Death sentence after unfair proceedings
Procedural issues:	Failure of State party to provide information
Substantive issues:	Imposition of death sentence after unfair trial and ill-treatment during preliminary investigation
Articles of the Covenant:	6, 7, 10, 14
Articles of the Protocol:	2, 5 (4)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 30 March 2005,

Having concluded its consideration of communication No. 973/2001, submitted to the Human Rights Committee on behalf of Mr. Validzhon Alievich Khalilov under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Mrs. Maryam Khalilova, a Tajik citizen born in 1954. She submits the communication on behalf of her son - Validzhon Alievich Khalilov, also a Tajik national, born in 1973, who at the time of submission of the communication was kept on death row in Detention Centre SIZO No. 1 in Dushanbe and awaiting execution, following a death sentence handed down by the Supreme Court of Tajikistan on 8 November 2000. She claims that her son is a victim of violations by Tajikistan of articles 6, paragraphs 1 and 4; 10, paragraph 1; and 14, paragraphs 2, 3 (g), and 5, of the International Covenant on Civil and Political Rights. The communication also appears to raise issues under article 7 of the Covenant, with regard to the author and her son, although this provision was not directly invoked by the author. The author is not represented by counsel.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen and Mr. Roman Wieruszewski.

1.2 On 16 May 2001, in accordance with rule 92 (old rule 86) of its rules of procedure, the Human Rights Committee, acting through its Special Rapporteur on new communications, requested the State party not to carry out the death sentence against Mr. Khalilov while his case was pending before the Committee. This request for interim measures for protection was reiterated on 17 December 2002 and on 15 April 2004. No reply has been received from the State party. By letter of 18 February 2005, the author informed the Committee that on 10 February 2005, she received an attestation signed by a Deputy Chairman of the Supreme Court, in accordance to which her son's execution had been carried out on 2 July 2001.

Factual background

2.1 In 1997, one Saidmukhtor Yorov formed an armed gang in the Gulliston district, Lenin region, Tajikistan. By force and through the use of threats, he recruited young people into his gang and forced them to commit several serious crimes. The author explains that her son was threatened at gunpoint and forced to join Yorov's gang. When her son realized the so-called "anti- constitutional" nature of the gang's activities, he escaped and hid in the house of an aunt in the Lokhur district, to avoid persecution by this gang.

2.2 In April 1997, Mr. Khalilov visited his home town (Khosilot kolkhoz) in the Gulliston district, to attend the wedding of his sister. After the ceremony, Mr. Khalilov and his father went to pray in the town mosque. According to the author, her son was recognized there by members of Yorov's gang who immediately apprehended him and brought him before Yorov. Mr. Khalilov was forced to joint the ranks of the group again.

2.3 In late September 1997, government troops dropped leaflets from helicopters, containing a Presidential appeal to all persons who "by force and lies" had joined Yorov's gang. The President explained that in case of peaceful surrender, members of the gang would be pardoned. Mr. Khalilov escaped again; the gang thereupon threatened his parents with murder. Members of the gang located him at his aunt's house and brought him to Yorov, who threatened that all members of his family would be killed if he escaped once again.

2.4 In December 1997, however, Mr. Khalilov did escape again and hid in another aunt's house, in the Hissar region. Shortly afterwards, he learned that the gang had been disbanded, that Yorov was prosecuted, and that the charges against him were withdrawn. He left the Hissar region in June 1998 to return to Lokhur district. There, the authorities arrested him in January 2000.

2.5 According to the author, her son was beaten by investigators to make him confess participation in different unresolved crimes, including murder, use of violence, robberies and theft, and different other crimes that occurred between 1998 and 2000. According to her, the investigators refused to interrogate neighbours of the aunts in whose houses her son hid between December 1997 and January 2000, and who could have testified that he was innocent.

2.6 On an unspecified date, Mr. Khalilov was transferred from the Lenin District Police Department to Kaferingansky District Police Department. In the meantime, his father was taken from his workplace and brought to his son in the Kaferingansky District Police Department. The father noted that his son had been beaten and stated that he would complain to the competent authorities. The investigators began to beat him in front of his son. The author's son was threatened and told that he had to confess his guilt of two murders during a TV broadcast or otherwise his father would be killed. Mr. Khalilov confessed guilt in the two murders as requested. Notwithstanding, the investigators killed his father.[1]

2.7 On 12 February, Mr. Khalilov was shown again on national television (broadcast "Iztirob"). According to the author, he had been beaten and his nose was broken, but the cameras showed his face only from one particular angle that did not reveal these injuries.

2.8 Mr. Khalilov's case was examined by the Supreme Court jointly with the cases of other five co-accused.[2] The author's son was found guilty of the crimes under articles 104 (2) (homicide), 181 (3) (hostage taking), 186 (3) (banditism), 195 (3) (illegal buying, selling, keeping, transporting of weapons, ammunitions, explosives, etc.), 244 (theft), and 249 (robbery with use of violence), of the Criminal Code of Tajikistan. He was sentenced to death on 8 November 2000. According to the author, no victim or injured party recognized her son in court as a participant in the criminal acts, notwithstanding the fact that the witnesses had declared that they could recognize by face every participant in the crimes. The Court allegedly ignored their statements and refused to take them into account or to include them in its decision.

2.9 The author's son filed a request for presidential pardon, but his request was denied on 23 May 2001.

2.10 In a letter dated 5 June 2003, the author reiterates that her son was forced to join the gang of Yorov but did not commit any crimes. He escaped the gang and after the liquidation of the gang, when no risk of persecution by the gang remained, he "returned to normal life". When the crimes were committed, he was at his aunts' houses. After his arrest in 2000, he was charged for crimes that were committed by the gang and was subsequently sentenced to death. It is stated that the judgement was uphold by the cassation instance" (date and instance not provided).

2.11 The author also explains that she does not know where her son is held. The officials of the SIZO No. 1 Detention Centre in Dushanbe allegedly had refused to accept her parcels, telling that her son was removed, without explaining further.

2.12 On 18 February 2005, the author informed the Committee that she received a letter from the Deputy Chairman of the Supreme Court, dated 2 February 2005, where it was stated that her son was executed on 2 July 2001.

The complaint

3.1 The author claims that her son's rights under article 10, paragraph 1, were violated, as he was severely beaten by investigators. Although the author does not invoke it specifically, this part of the communication may also raise issues under article 7 of the Covenant in Mr. Khalilov's respect.

3.2 Although the author does not specifically invoke this provision, her claim that in order to put her son under more pressure, the investigators had brought her husband to the detention centre where he was beaten to death in front of his son, appears to also raise issues under article 7 of the Covenant, in her son's respect.

3.3 The author claims that the facts as presented amount to a violation of her son's right to be presumed innocent under article 14, paragraph 2. She recalls that her son was shown on national television during the investigation - i.e. before any determination of his guilt by a court - and was forced publicly to confess his guilt for several serious crimes.

3.4 The author further claims that her son was a victim of violation of article 14, paragraph 3 (g), of the Covenant, as investigators forced him to confess his guilt.

3.5 Without further substantiating this claim, the author contends that Mr. Khalilov's right under article 14, paragraph 5, to have his sentence reviewed by a higher judicial instance in accordance with the law, was also violated.

3.6 The author contends that her son's rights under article 6, paragraphs 1 and 4, in conjunction with article 14, were violated because her son was sentenced to death, after an unfair trial that did not meet the requirements of due process.

3.7 Finally and notwithstanding the fact that the author does not raise the issue specifically, the communication also appears to raise issues under article 7, in her own respect, because of the alleged constant refusal of Tajik authorities to reveal to the author the current situation and whereabouts of her son.

State party's failure to respect the Committee's request for interim measures under rule 92

4.1 The Committee notes that the State party had executed the author's son despite the fact that a communication had been registered before the Human Rights Committee under the Optional Protocol and a request for interim measures of protection had been addressed to the State party in this respect. The Committee recalls[3] that by adhering to the Optional Protocol, a State party to the Covenant recognizes the competence of the Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant (Preamble and article 1). Implicit in a State's adherence to the Protocol is an undertaking to cooperate with the Committee in good faith so as to permit and enable it to consider such communications, and after examination to forward its views to the State party and to the individual (art. 5 (1), (4)). It is incompatible with these obligations for a State party to take any action that would prevent or frustrate the Committee in its consideration and examination of the communication, and in the expression of its Views.

4.2 Apart from any violation of the Covenant found against a State party in a communication, a State party commits grave breaches of its obligations under the Optional Protocol if it acts to prevent or frustrate consideration by the Committee of a communication alleging a violation of the Covenant, or to render examination by the Committee moot and the expression of its Views nugatory and futile. In the present communication, the author alleges that her son was denied rights under articles 6, 10 and 14 of the Covenant. She further makes claims that could be subsumed under article 7, even though this article is not specifically invoked. Having been notified of the communication, the State party has breached its obligations under the Protocol, by executing the alleged victim before the Committee concluded its consideration and examination and the formulation and communication of its Views. It is particularly inexcusable for the State to having done so after the Committee has acted under rule 92 (old 86) of its rules of procedure, requesting that the State party refrains from doing so.

4.3 The Committee also expresses great concern about the lack of State party's explanation for its action, in spite of several requests made in this relation by the Committee.

4.4 The Committee recalls[4] that interim measures pursuant to rule 92 (old 86) of the Committee's rules of procedure adopted in conformity with article 39 of the Covenant, are essential to the Committee's role under the Protocol. Flouting of the Rule, especially by irreversible measures such as, as in the present case, the execution of the author's son undermines the protection of Covenant rights through the Optional Protocol.

Absence of State party submissions

5. By notes verbales of 16 May 2001, 17 December 2002, and 15 April 2004, the State party was requested to submit to the Committee information on the admissibility and merits of the communication. The Committee notes that this information has still not been received. The Committee regrets the State party's failure to provide any information with regard to admissibility or the substance of the author's claims. It recalls that it is implicit in the Optional Protocol that States parties make available to the Committee all information at their disposal.[5] In the absence of a reply from the State party, due weight must be given to the author's allegations, to the extent that these have been properly substantiated.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that the same matter is not being examined under any other international procedure of investigation and settlement, and that available domestic remedies have been exhausted on the basis of the evidence made available to it. In the absence of any State party objection, it considers that the conditions set forth in paragraphs 2 (a) and (b) of article 5 of the Optional Protocol are satisfied.

6.3 The Committee has noted the author's claim that her son's rights under article 6, paragraph 4, of the Covenant, were violated. From her submission, however, it transpires that Mr. Khalilov had submitted a request for Presidential pardon on an unspecified date, and that his request was denied, by Presidential decree, on 23 May 2001. In the circumstances, the Committee finds that the author had failed sufficiently to substantiate this claim for purposes of admissibility, and decides accordingly that this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.4 The Committee considers that the remaining author's claims have been sufficiently substantiated for purposes of admissibility, in that they appear to raise issues under articles 6, 7, 10, and 14, of the Covenant.

Examination of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee has taken note of the author's allegations that her son, while in detention, was ill-treated and beaten by the investigators to force him to confess guilt and that in order to put additional pressure on him, his father was beaten and tortured in front of him and as a consequence died in the police premises. The author furthermore identified by name some of the individuals alleged to have been responsible for the beatings of her son and for burning her husband's hands with an iron. In the absence of any State party information, due weight must be given to the author's allegations, to the effect that they have been sufficiently substantiated. The Committee considers that the facts before it justify the conclusion that the author's son was subjected to torture and to cruel and inhuman treatment, in violation of articles 7 and 10, paragraph 1, of the Covenant.

7.3 As above-mentioned acts were inflicted by the investigators on Mr. Khalilov to make him to confess guilt in several crimes, the Committee furthermore considers that the facts before it also disclose a violation of article 14, paragraph 3 (g), of the Covenant.

7.4 The Committee has noted the author's claim, under article 14, paragraph 2, that her son's right to be presumed innocent was violated by investigators. She contends that her son was forced to admit guilt on at least two occasions during the investigation on national television. In the absence of any information from the State party, due weight must be given to these allegations. The Committee recalls its general comment No. 13 and its jurisprudence[6] that it is "a duty for all public authorities to refrain from prejudging the outcome of a trial". In the present case, it concludes that the investigating authorities failed to comply with their obligations under article 14, paragraph 2.

7.5 The author claimed that her son's right to have his death sentence reviewed by a higher tribunal according to law was violated. From the documents before the Committee, it transpires that on 8 November 2000, the author's son was sentenced to death at first instance by the Supreme Court. The judgement mentions that it is final and not subject to any further cassation appeal. The Committee recalls that even if a system of appeal may not be automatic, the right to appeal under article 14, paragraph 5, imposes on the State party a duty substantially to review, both on the basis of sufficiency of the evidence and of the law, the conviction and sentence, such that the procedure allows for due consideration of the nature of the case.[7] In the absence of any pertinent explanation from the State party, the Committee considers that the absence of a possibility to appeal to a higher judicial instance judgements of the Supreme Court handed down at first instance, falls short of the requirements of article 14, paragraph 5, and, consequently, that there has been a violation of this provision.[8]

7.6 With regard to the author's claim under article 6, paragraph 1, of the Covenant, the Committee recalls that that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes a violation of article 6 of the Covenant.[9] In the current case, the sentence of death of the author's son was passed, and subsequently carried out, in violation of the right to a fair trial as set out in article 14 of the Covenant, and therefore also in violation of article 6 of the Covenant.

7.7 The Committee has noted the author's claim that the Tajik authorities, including the Supreme Court, have consistently ignored her requests for information and systematically refused to reveal any detail about her son's situation or whereabouts. The Committee understands the continued anguish and mental stress caused to the author, as the mother of a condemned prisoner, by the persisting uncertainty of the circumstances that led to his execution, as well as the location of his gravesite. The secrecy surrounding the date of execution, and the place of burial have the effect of intimidating or punishing families by intentionally leaving them in a state of uncertainty and mental distress. The Committee considers that the authorities' initial failure to notify the author of the execution of her son amounts to inhuman treatment of the author, in violation of article 7 of the Covenant.[10]

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of Mr. Khalilov's rights under articles 6, paragraph 1; 7; 10, paragraph 1; and 14, paragraphs 2, 3 (g) and 5, of the Covenant, and a violation of article 7 in the author's own respect.

9. Under article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including information on the location where her son is buried, and compensation for the anguish suffered. The State party is also under an obligation to prevent similar violations in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to these Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] The author submits a letter of her son (dated 27 December 2000), addressed to the Committee, in which M. Khalilov contends that his father was brought to the police department and was beaten, humiliated, and burned with an iron by the investigators, until he died. According to Mr. Khalilov, his father was returned home dead and was buried on 9 February 2000. Mr. Khalilov gives the names of two officials who participated in his and his father's beatings: one N., chief of a Criminal Inquiry Department, and his deputy, U. According to him, there were also 3-4 other persons.

[2] The exact dates of the proceedings are not provided.

[3] See *Piandong v. The Philippines*, communication No. 869/1999, Views adopted on 19 October 2000.

[4] See *Saidova v. Tajikistan*, communication No. 964/2001, Views adopted on 8 July 2004.

[5] See, inter alia, *Khomidova v. Tajikistan*, communication No. 1117/2002, Views adopted on 29 July 2004.

[6] See, for example *Gridin v. The Russian Federation*, communication No. 770/1997, Views adopted on 20 July 2000.

[7] See *Domukovsky and al. v. Georgia*, communications No. 623-627/1995, Views adopted on 6 April 1998, and *Saidova v. Tajikistan*, communication No. 964/2001, Views adopted on 8 July 2004.

[8] See for example *Aliev v. Ukraine*, communication No. 781/1997, Views adopted on 7 August 2003, *Robinson v. Jamaica*, communication No. 223/1987, Views adopted on 30 March 1989, *Brown v. Jamaica*, communication No. 775/1997, Views adopted on 23 March 1999.

[9] See *Conroy Levy v. Jamaica*, communication No. 719/1996, Views adopted on 3 November 1998, *Clarence Marshall v. Jamaica*, communication No. 730/1996, Views adopted on 3 November 1998, *Kurbanov v. Tajikistan*, communication No. 1096/2002, Views adopted on 6 November 2003, and *Saidova v. Tajikistan*, communication No. 964/2001, Views adopted on 8 July 2004.

[10] See communications Nos. 886/1999, *Bondarenko v. Belarus*, and 887/1999, *Lyashkevich v. Belarus*, Views adopted on April 2003.

J. Communication No. 975/2001, *Ratiani v. Georgia*
(Views adopted on 21 July 2005, eighty-fourth session)*

Submitted by:	Shota Ratiani (not represented by counsel)
Alleged victim:	The author
State party:	Georgia[1]
Date of initial communication:	22 July 1998 (initial submission)
Subject matter:	Arrest and mistreatment of supporter of State party's former President; unfair trial on charges of involvement in plot to kill presidential successor
Substantive issues:	Unfair trial - no right of appeal - failure to exhaust domestic remedies - lack of substantiation in relation to certain allegations
Articles of the Covenant:	7, 9 (1) and (4), 10 (1), 14 (1), (2), (3) (c), (d) and (e), and 14 (5)
Articles of the Protocol:	2, 5 (2) (a) and (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 21 July 2005,

Having concluded its consideration of communication No. 975/2001, submitted to the Human Rights Committee by Shota Ratiani, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Shota Ratiani, born 1955, a Georgian citizen. He claims to be a victim of violations by Georgia of article 1, paragraph 1, article 2, paragraph 1, article 7, article 8, paragraph 2, article 9, paragraphs 1 and 4, article 10, paragraph 1, article 14, paragraphs 1, 2, 3 (c), 3 (d), 3 (e), and 5, article 19, paragraphs 1 and 2, article 21, article 25, paragraphs (a) and (b), and article 26 of the Covenant. He is unrepresented.

Factual background

2.1 The author was a supporter of the former President of Georgia, Zviad Gamsakhurdia. He served in Mr. Gamsakhurdia's National Guards, and took part in the armed conflict in Georgia in 1993, supporting Mr. Gamsakhurdia and his government.

2.2 On 30 August 1995, following an apparent assassination attempt on President Shevardnadze the previous day, the author was arrested together with 10 others. There was no warrant for his arrest. He was charged with attempting to overthrow the government (high treason), attempted terrorism, and participating in an organization acting against the State. On the day of his arrest, representatives of the Security Service made statements on television and in the press to the effect that the author and the others arrested were "terrorists" and supporters of former President Gamsakhurdia.

2.3 According to the author, members of the Security Service were subsequently arrested in connection with the assassination attempt, but the authorities suspected the author and those others arrested of being accomplices in the assassination plot by diverting attention away from those responsible.

2.4 The author contends that charges against him were fabricated, and that accusations against him were very general. For example, he was accused of being an "active member" of a subversive group, because he used to meet once a week with a group of people, one of whom was later charged with terrorist offences.

2.5 The author claims that, whilst being interrogated on the day of his arrest, he was beaten, threatened and insulted, and was not provided with a lawyer. He claims he was not given prompt access to relevant case file documents, and that the trial did not begin until a year and half after his arrest. He states that, during his trial, only abstract and indirect evidence was produced against him, some of which was extracted from other detainees through threats and beatings. No details are provided in this regard. He claims that the Court refused to consider his allegations about "violations" committed by the Security Service, or his allegations about the lawfulness of his arrest and trial, and that his demand to interrogate witnesses who could prove his innocence was rejected. On 21 April 1997, he was found guilty and sentenced to seven years imprisonment. He claims that he was denied the right to appeal from this decision.

2.6 The author alleges that he was tried and convicted because of his political views, as a supporter of the former President.

2.7 On 9 February 1998, the author wrote to the People's Defender of Georgia in relation to his allegations of unlawful arrest and unfair trial. On 15 May 1999, the Public Defender sent a letter to the Presidium of the Supreme Court, requesting it to review the author's case. It transpires that the Supreme Court subsequently reviewed the author's case and revised the sentence.

The complaint

3.1 The author alleges that he was beaten and mistreated by the Security Service, in contravention of articles 7 and 10; that his detention was arbitrary and unlawful, in contravention of article 9; and that the Supreme Court did not consider his allegations about the unlawfulness of his arrest (art. 9, para. 4). He alleges numerous violations of article 14: that he was not afforded prompt access to relevant Court material for the purposes of preparing his defence (art. 14, para. 3 (b)); that he was not provided with a lawyer at particular times (art. 14, para. 3 (d)); that he was prevented from examining witnesses (art. 14, para. 3 (e)), that the presumption of innocence was not observed in his case (art. 14, para. 2); and that his conviction was not subject to appeal (art. 14, para. 5).

3.2 The author contends that his detention and trial were politically motivated, in contravention of his rights under article 19, paragraphs 1 and 2. He also alleges, without further substantiating these claims, violations by the State party of articles 1, 8, 21, 25 and 26.

The State party's observations and the author's comments

4.1 By note dated 24 May 2001, the State party submits that the author was sentenced to seven years' imprisonment by the Collegium of the Supreme Court of Georgia for high treason, attempted terrorism and involvement in an anti-State organization. It states that, by decision dated 14 May 1999, the Presidium of the Supreme Court subsequently reduced the author's sentence to 3 years, 8 months and 14 days, and the author was released on the same day from the courtroom.

4.2 The State party contends that the author had the right to apply to the court for "rehabilitation", but that no such application was made.

5.1 In his comments on the State party's submissions dated 28 July 2001, the author provides further information about the apparent assassination attempt of the Georgian President in 1995. He quotes former officials, cited in newspaper articles, who claimed that the assassination attempt was orchestrated by the security forces and the President himself in order to incriminate supporters of former President Gamsakhurdia.

5.2 In February 1998, following his conviction by the Supreme Court, which was not subject to appeal, the author wrote to the newly appointed office of the Public Defender for assistance, seeking to have his conviction reviewed. The letter was forwarded to the Presidium of the Supreme Court, which on 16 June 1998 rejected his request. On 25 January 1999 the Public Defender forwarded another letter to the Presidium of the Supreme Court on the author's behalf. The author states that, under Georgian law, the Presidium of the Supreme Court was required to comment on the Public Defender's statements within two months. When no response was received by May, the author went on a hunger strike, requesting an answer. The author states that on 14 May 1999, the Supreme Court reviewed his conviction in closed session, and decided to reduce his sentence to reflect the precise amount of time he had already spent in prison. The author adds that he was not, as the State party contended, released from the Courtroom, as he was not present in Court, but was released the following day.

Further submissions by the parties

6.1 In observations on the author's comments dated 27 August 2001, the State party forwards information from the Office of the Prosecutor General regarding the author's case. It states that the author was convicted by the Collegium of the Supreme Court on 21 April 1997. Under the law applicable at the time, it was not possible to file an appeal from such a decision. However, the Presidium of the Supreme Court considered the author's 'supervisory complaint' (the complaint forwarded by the Public Defender) and commuted the sentence which had been imposed. However, his conviction stands.

6.2 The State party notes that, following the decision of the Supreme Court on 14 May 1999, the author was released from prison after the necessary formalities were completed. It contends that the extracts from newspapers referred to in the author's comments cannot be viewed as a substantiation of his claims about his innocence.

6.3 Finally, the State party explains that, if the author could identify new circumstances which cast doubt on the correctness of his conviction, he could apply to the Supreme Court of a retrial. If acquitted, he would have the right to "rehabilitation" under Georgian law.

7. In further comments dated 19 October 2001, the author states that the newspaper articles referred to in his earlier comments are relevant to the question of his innocence. The author provides further details of the Public Defender's "recommendation" to the Supreme Court that his sentence be overturned, quoting 4 extracts which address apparent flaws in the evidence on which he was convicted, and other evidence which pointed to his innocence.

8. In further observations dated 27 December 2001, the State party encloses a memorandum from the President of the Supreme Court, which lists the offences of which the author was convicted, the original sentence imposed and its subsequent commutation. It states that, under Georgian criminal procedure legislation, a decision of the Presidium of the Supreme Court of Georgia may only be revised on the basis of new circumstances, and that an application for review must be made to the Prosecutor General. The Supreme Court will review the case if the Prosecutor General declares that new circumstances exist, and recommends a review.

9. In further comments dated 12 February 2002, the author reiterates his earlier claims. On 2 September 2004, the author presented a further submission, in which he reiterates that, under Georgian legislation prevailing at the time, his conviction by the Supreme Court on 21 April 1997 did not entail any right of appeal. He also attaches a copy of the letter sent by the Office of the Public Defender to the Presidium of the Supreme Court in January 1999, seeking a review of his conviction, and encloses a copy of the decision of the Presidium of the Supreme Court dated 14 May 1999, by which his sentence was reduced.

Issues and proceedings before the Committee

10.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

10.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a), of the Optional Protocol.

10.3 With regard to the author's claims under article 1, the Committee recalls its previous jurisprudence, and notes that such claims are not justiciable under the Optional Protocol. With regard to the claims under articles 2, 8, 9, 10, 14, paragraph 3 (d), 19, 21, 25 and 26 of the Covenant, the Committee considers that the author has not provided sufficient substantiation in support of his allegations, and accordingly declares them inadmissible under article 2 of the Optional Protocol.

10.4 In relation to the author's claims under articles 7 and 10, namely that he was beaten, threatened and insulted, and in relation to his claim that he was not provided with access to a lawyer, contrary to article 14, paragraph 3 (d), the Committee notes that the author's claims in this regard are general in nature, and considers that the author has not provided sufficiently detailed information in order to substantiate them. Accordingly, the Committee declares these claims inadmissible under article 2 of the Optional Protocol.

10.5 In respect of the author's claims under article 14, paragraph 1, that he was wrongly convicted, the Committee considers that the subject matter of the allegations relates in substance to the evaluation of facts and evidence in the course of proceedings before the Supreme Court of Georgia. The Committee recalls its jurisprudence and reiterates that it is generally not for itself, but for the courts of States parties to review or to evaluate facts and evidence, unless it can be ascertained that the conduct of the trial or the examination of the facts and evidence was manifestly arbitrary or amounted to a denial of justice.[2] The Committee concludes that the conduct of judicial proceedings in the author's case did not suffer from such deficiencies. Accordingly, the author's claims under article 14, paragraphs 1 and 2, are inadmissible under article 2 of the Optional Protocol.

10.6 As to the author's allegations that his right to the presumption of innocence was violated by public statements made by representatives of the security service, the Committee recalls its general comment No. 13 on article 14, which states that it is the duty of all public authorities to refrain from prejudging the outcome of a trial.[3] However, the author's claims in this regard are general, and the Committee considers that the author has failed to provide sufficiently detailed information in order to substantiate them. Accordingly, the Committee declares these claims inadmissible under article 2 of the Optional Protocol.

10.7 Regarding the claim under article 14, paragraph 3 (c), the Committee notes that the State party has not provided information on the length of time between the author's detention and his trial, however it recalls its jurisprudence and considers that a period of a year and half does not, of itself, constitute undue delay.[4] The question of what constitutes "undue delay" depends on the circumstances of each case, such as the complexity of the alleged offences and their investigation. In the absence of further information, the Committee considers that this allegation is not sufficiently substantiated and accordingly declares it inadmissible under article 2 of the Optional Protocol.

10.8 In relation to the author's allegation that, not having had the opportunity to call certain witnesses, he was deprived of his rights under article 14, paragraph 3 (e), the Committee notes that no details have been provided about the identity of the witnesses in question, or the circumstances in which the author requested, and the Court denied, the presence of these witnesses in Court. Although the State party's submissions do not address this issue, the Committee considers that this allegation is not sufficiently substantiated, and accordingly also declares it inadmissible under article 2 of the Optional Protocol.

10.9 The Committee sees no impediment to the admissibility of the author's claim under article 14, paragraph 5, and proceeds to the examination of the merits.

Consideration of the merits

11.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

11.2 As to the claim that the author was unable to appeal his conviction by the Supreme Court, the Committee recalls its jurisprudence that article 14, paragraph 5, requires there to be an available appellate procedure which should entail a full review of the conviction and sentence, together with a due consideration of the case at first instance.[5] In the present case, three review procedures have been referred to by the author, and the Committee must consider whether any of them satisfies the requirements of article 14, paragraph 5. Firstly, the author stated that he complained about his conviction to the Office of the Public Defender, who, it appears, reviewed the author's case, and prepared a recommendation to the Presidium of the Supreme Court. It transpires that, as a result of this process, the Presidium of the Supreme Court reviewed the author's case and ultimately revised his sentence, whereupon he was released from imprisonment. The State party notes that, under Georgian law then in force (2001), it was not possible to file an appeal against a decision of the Collegium of the Supreme Court, which convicted the author, but that, based on the author's "supervisory complaint", the Presidium of the Supreme Court reviewed the author's case and commuted his sentence. The Committee notes that the State party itself does not refer to this process as being equivalent to a right of appeal; rather, it is referred to merely as a "supervisory complaint". The Committee recalls its previous jurisprudence that a request for a "supervisory" review which amounts to a discretionary review, and which offers only the possibility of an extraordinary remedy, does not constitute a right to have one's conviction and sentence reviewed by a higher tribunal according to law. From the material before the Committee, it appears that the supervisory complaint process in this instance is of such a nature. Accordingly, based on the information before it, the Committee considers that this process does not amount to a right of appeal for the purpose of article 14, paragraph 5, of the Covenant.[6]

11.3 Secondly, the State party submits that the author could apply to the Supreme Court for a review of his case, through the Prosecutor General, if he could identify new circumstances which called into question the correctness of the original decision. However, the Committee does not consider that such a process meets the requirements of article 14, paragraph 5; the right of appeal entails a full review by a higher tribunal of the existing conviction and sentence at first instance. The possibility of applying to a Court to review a conviction on the basis of new evidence is by definition something other than a review of an existing conviction, as an existing conviction is based on evidence which existed at the time it was handed down. Similarly, the Committee considers that the possibility of applying for rehabilitation cannot in principle be considered an appeal of an earlier conviction, for the purposes of article 14, paragraph 5. Accordingly, the Committee considers that the review mechanisms invoked in this case do not meet the requirements of article 14, paragraph 5, and that the State party violated the author's right to have his conviction and sentence reviewed by a higher tribunal according to law.

12. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of article 14, paragraph 5, of the Covenant.

13. Pursuant to article 2, paragraph 3 (a), of the Covenant, the author is entitled to an appropriate remedy. The State party is under an obligation to grant the author appropriate compensation, and to take effective measures to ensure that similar violations do not reoccur in the future.

14. By becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not, and that, pursuant to article 2 of the Covenant, that the State party has undertaken to ensure all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant, and to provide an effective and enforceable remedy in cases where a violation has been established. The Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] The Optional Protocol entered into force in relation to Georgia on 3 August 1994.

[2] See, for example communication No. 546/1993, *Errol Simms v. Jamaica*, Views adopted on 3 April 1995, para. 6.2.

[3] See also: communication No. 770/1997, *Gridin v. The Russian Federation*, Views adopted 20 July 2000, para. 8.3.

[4] For example, in *Kelly v. Jamaica* (communication No. 253/1987, Views adopted 8 April 1991), a period of 18 months delay between arrest and the commencement of trial was considered not to amount to undue delay, as it had not been established that the investigations could have been concluded earlier.

[5] See for example communication No. 842/1998, *Romanov v. Ukraine*, Views adopted 30 October 2003.

[6] See communication No. 836/1998, *Gelazauskas v. Lithuania*, Views adopted 17 March 2003. Note also that the European Court of Human Rights has determined that a 'supervisory' appeal of this nature does not constitute an 'effective remedy' for its admissibility requirements, due to its discretionary nature; see *Tumilovich v. Russia*, No. 47033/99, 22 June 1999 (dec); and *Pitkevich v. Russia*, No. 47936/99, 8 February 2001 (dec).

K. Communication No. 1023/2001, *Länsman III v. Finland* (Views adopted on 17 March 2005, eighty-third session)[*]

Submitted by:	Jouni Länsman, Eino Länsman and the Muotkatunturi Herdsmen's Committee (represented by counsel, Ms. Johanna Ojala)
Alleged victim:	The authors
State party:	Finland
Date of initial communication:	6 November 2000 (initial submission)
Subject matter:	Rights of reindeer herders with respect to logging operations undertaken by the State party
Procedural issues:	Request for review of admissibility decision
Substantive issues:	Extent to which logging may be carried out by State authorities before it will be considered to violate the rights of reindeer herders
Articles of the Covenant:	27
Articles of the Optional Protocol:	2, and 5, paragraph 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 17 March 2005,

Having concluded its consideration of communication No. 1023/2001, submitted to the Human Rights Committee on behalf of Jouni Länsman, Eino Länsman and the Muotkatunturi Herdsmen's Committee, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

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[*] The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The authors of the communication are Jouni E. Länsman, Eino A. Länsman, both Finish citizens, and the Muotkatunturi Herdsmen's Committee (of which the two individual authors are part). The authors allege to be victims of a violation by Finland of article 27 of the Covenant. They are represented by counsel. The Optional Protocol entered into force for the State party on 23 March 1976.

1.2 On 31 October 2002, under rule 86 of its rules of procedure, the Committee, acting through its Chairperson, requested the State party "to refrain from conducting logging activities that would affect the exercise by Mr. Jouni Länsman et al. of reindeer husbandry in the Angeli area, while their case is under consideration by the Committee".

Factual background

2.1 On 30 October 1996, the Committee delivered its Views in *Länsman et al. v. Finland* ("the earlier communication").[1] The Committee found, on the evidence then before it, no violation of the rights under article 27 of the current two individual authors (and others) in the completed logging of some 250 hectares in Pyhäjärvi and the proposed logging of some further 250 hectares in Kirkko-outa (both are in the Angeli area).

2.2 The Committee went on to find:

> 10.6 As far as future logging activities are concerned, the Committee observes that on the basis of the information available to it, the State party's forestry authorities have approved logging on a scale which, while resulting in additional work and extra expenses for the authors and other reindeer herdsmen, does not appear to threaten the survival of reindeer husbandry. That such husbandry is an activity of low economic profitability is not, on the basis of the information available, a result of the encouragement of other economic activities by the State party in the area in question, but of other, external, economic factors.
>
> 10.7 The Committee considers that if logging plans were to be approved on a scale larger than that already agreed to for future years in the area in question or if it could be shown that the effects of logging already planned were more serious than can be foreseen at present, then it may have to be considered whether it would constitute a violation of the authors' right to enjoy their own culture within the meaning of article 27. The Committee is aware, on the basis of earlier communications, that other large-scale exploitations touching upon the natural environment, such as quarrying, are being planned and implemented in the area where the Sami people live. Even though in the present communication the Committee has reached the conclusion that the facts of the case do not reveal a violation of the rights of the authors, the Committee deems it important to point out that the State party must bear in mind when taking steps affecting the rights under article 27, that though different activities in themselves may not constitute a violation of this article, such activities, taken together, may erode the rights of Sami people to enjoy their own culture.

2.3 By 1999, all 500 hectares of the two areas at issue in the earlier communication had been logged. Moreover, in 1998, a further 110 hectares were logged in the Paadarskaidi area of the Herdsmen's Committee (not part of the areas covered by the earlier communication).

2.4 By the date of submission of the communication, yet another logging operation in Paadarskaidi had been proposed, with minimal advance warning to the Herdsmen's Committee and with an imminent commencement date. At that point, the Herdsmen's Committee had yet to receive a written plan of the nature and scope of the logging operation. The National Forest & Park Service had indicated that it would send the plans to the Herdsmen's Committee at a later date, having indicated in its previous plan that the next logging operation would be due to take place only after a year and in a different location.

The complaint

3.1 The authors allege a violation of their rights as reindeer herders under article 27 of the Covenant, both inasmuch as it relates to logging already undertaken and to logging proposed. At the outset, they complain that since the 1980s, some 1,600 hectares of the Herdsmen's Committee's grazing area in Paadarskaidi have been logged, accounting for some 40 per cent of lichen (utilized for feeding reindeer) in that specific area.

3.2 As to the effect of the logging on the author's herd, it is submitted that reindeer tend to avoid areas being logged or prepared for logging. They therefore stray to seek other pastures and thereby incur additional labour for the herders. After logging, logging waste prevents reindeer grazing and compacted snow hampers digging. The logging operations result in a complete loss of lichen in the areas affected, allegedly lasting for hundreds of years.

3.3 The authors recall that after heavy snows in 1997, herders had for the first time to supply capital and labour intensive fodder for the reindeer rather than rely on lichen. The ongoing and increasing logging of fine lichen forests increases the necessity of providing fodder and threatens the economic self-sustainability of reindeer husbandry, as husbandry depends on the reindeer being able to sustain themselves.

3.4 The authors recall that the maximum number of reindeer that may be kept by the Herdsmen's Committee is decided by the Ministry of Agriculture and Forestry. The Ministry is charged by statute, in determining the maximum number of reindeer, to ensure that the number of reindeer grazing in the Herdsmen's Committee's area in the winter season does not exceed the sustainable productive capacity of the Herdsmen's Committee's winter pastures. Since the Committee's Views in the earlier communication, the Ministry has twice reduced the Herdsmen's Committee's number of animals: from 8,000 to 7,500 in 1998, and from 7,500 to 6,800 in 2000. In two administrative decisions within two years, then, the Ministry considered that the sustenance of winter pasture in Muotkatunturi was so low that the sustainable number of reindeer should be reduced by 15 per cent. The authors allege that the principal cause of this decline in winter pastures, and particularly of horsehair lichen pastures, are the logging operations.

3.5 Despite the recent reductions in reindeer herds, the National Forest & Park Service continues to conduct logging operations, destroying the Herdsmen's Committee's pastures, and further deteriorating husbandry conditions. The authors contend that this situation violates article 27, in that forestry operations are continuing and the effects are more serious than first thought. At the same time that logging proceeds, reindeer numbers have been reduced because the pastures still available cannot support the previous number of reindeer.

3.6 The authors state that, in respect of logging at Kirkko-outa and Pyhäjärvi, all domestic remedies have been exhausted. As to the other areas, the authors invoke the Committee's Views in the earlier communication for the proposition that the domestic courts do not need to be seized afresh of the matter. These elements are said to be satisfied, since the State party itself recognizes that the effects have been more serious, while it continues both to log and to plan further logging.

The State party's admissibility submissions

4.1 On 31 December 2001, the State party supplied its observations on the admissibility only of the communication. On 8 February 2002, the Committee, acting through its Chairperson, decided to separate the consideration of the admissibility and the merits of the case.

4.2 The State party informed the Committee that it "refrains from conducting logging activities in the Angeli area (paragraph 10.1[2] in the Committee's Views in case No. 671/1995, 30 October 1996) that would affect the exercise by the individual authors' reindeer husbandry while their communication is under consideration by the Committee".

4.3 The State party notes that as far as the Paadarskaidi area is concerned, the National Forest & Park Service carried out increment felling (preparative cutting) totalling some 200-300 hectares between 1998 and 2000. The distance between the Angeli area and the Paadarskaidi area is about 30 kilometres. It considers the communication inadmissible on three grounds: lack of proper standing as to one complainant, lack of exhaustion of domestic remedies, and for failure to substantiate the claims for purposes of admissibility.

4.4 While accepting the status of the individual authors, the State party rejects the ability of the Herdsmen's Committee to submit a communication. It considers that the Herdsmen's Committee does not fall within the entitlement of article 27 of the Covenant, nor is it an "individual" within the meaning of article 2 of the Optional Protocol. Under the Reindeer Herding Act, a Herdsmen's Committee consists of all herdsmen in a given area and who are not personally responsible for the performance of the Committee's duties; thus, any claim on the Herdsmen's Committee's behalf amounts to an *actio popularis.*

4.5 The State party observes that domestic remedies remain available, as shown by the decisions of the District Court, Court of Appeal and Supreme Court in the earlier communication, the effectiveness of which has not been contested. The authors did not initiate any proceedings regarding logging operations planned or carried out in either the Angeli or Paadarskaidi areas subsequent to the Committee's Views in the earlier communication.

4.6 The State party notes that in its Views on case 671/1995, the Committee merely observed that, if the logging effects were more serious or further plans were approved, it would have to be considered whether this would constitute a violation of the authors' article 27 rights. The Committee did not imply the requirement to exhaust domestic remedies could be done away with in any further complaint. This is particularly applicable when an assessment of a possible violation of article 27 requires an assessment of the relevant evidence both by the domestic courts and in turn the Committee. There is no proof that the effects of the earlier logging operations were more serious than foreseen at the time. The Ministry's decisions to reduce the Herdsmen's Committee's herd does not substantiate any claim of the effects of individual logging operations. Nor may the reductions in reindeer be considered a justification for not pursuing domestic remedies, where such allegations would be examined.

4.7 Accordingly, the authors have neither exhausted domestic remedies available to them, nor demonstrated any special circumstances which might absolve them from doing so. Finally, the State party argues that the brief communication lacks sufficient material basis, including basic evidence, that would go beyond a mere allegation. Accordingly, the case is said not to have been substantiated.

Authors' comments

5.1 In comments dated 15 March 2002, the authors supplied comments, restricted to the admissibility arguments of the State party.

5.2 As to the availability of domestic remedies in respect of the other areas (not covered by the earlier communication), the authors contend that the State party's suggestion of available remedies is misplaced. No court action designed to prevent specific logging plans was successful, partly because any concrete logging tract "is always only a seemingly modest part of the overall lands [that] are used by the Sami for reindeer herding". There is no indication that a case seeking positive protection for Sami herders would be successful, and, in any event, the existing Supreme Court ruling would be a further obstacle.

5.3 For the authors, the National Forest & Park Service has been too restrictive in providing information on its logging activities affecting the life of Angeli Sami. On the issue of substantiation of claims, the authors argue that they have shown that the reductions of reindeer after the Ministry's decisions was a direct consequence of the impact of logging on pasture areas. They have detailed the State party's plans to continue logging despite the Committee's earlier Views. The authors regard this as sufficient substantiation.

5.4 Finally, the authors state that there are plans for further logging by the National Forestry and Park Service within the area already subject to court proceedings, an area known as the Kippalrova tract.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 During its seventy-seventh session, the Committee considered the admissibility of the communication. On the contention that the Muotkatunturi Herdsmen's Committee did not have standing to bring a claim under the Optional Protocol, the Committee referred to its constant jurisprudence that legal persons are not "individuals" able to bring such a claim.[3] Neither was there an indication that individual members of the Muotkatunturi Herdsmen's Committee had authorized it to bring a claim on their behalf, or that Jouni and/or Eino Länsman were authorized to act on behalf of the Herdsmen's Committee and its members. Accordingly, while it was uncontested that Jouni and Eino Länsman had standing to bring the communication on their own behalf, the Committee considered the communication inadmissible under article 1 of the Optional Protocol insofar as it related to the Muotkatunturi Herdsmen's Committee and/or its constituent members, other than Jouni and Eino Länsman.

6.2 On the issue of exhaustion of domestic remedies, the Committee noted that with the Supreme Court's decision of 22 June 1995 there were no further avenues available to challenge the decision to undertake logging in the Pyhäjärvi and Kirkko-outa areas (the areas at issue in the earlier communication). Accordingly, the Committee considered that the issue of whether logging of these areas has had effects, in terms of article 27, greater than anticipated by either the Finnish courts in those proceedings or by the Committee in its Views on case No. 671/1995 is one that is admissible.

6.3 Regarding the Kippalrova area in which logging was planned, the Committee noted that this forest tract fell within the area covered by the Supreme Court decision of 22 June 1995. Accordingly it did not appear that further judicial review of this decision was possible. Accordingly, the Committee held the issues arising from the proposal to log this area to be admissible.

6.4 As to the 1998 logging in Paadarskaidi (outside the area covered by the Supreme Court decision), the Committee noted that the domestic remedies to which the State party points are all instances that have dealt, in terms of article 27, with logging plans prior to those plans being executed. In such circumstances, the decision on the anticipated future effects of logging is by necessity speculative, with only subsequent events bearing out whether or not the initial assessment was correct. The Committee observed that other cases referred to by counsel have also been challenges to proposed logging in advance. The Committee considered that the State party had not demonstrated, on the information supplied, what domestic remedies might be available to the authors seeking compensation or to obtain another appropriate remedy for an alleged violation of article 27 by virtue of logging that has already taken place. Accordingly, the Committee considered that the question of the effects, in terms of article 27, of logging in the Paadarskaidi already carried out was admissible.

6.5 On proposed further logging in Paadarskaidi, the Committee noted the authors' contention that no claim before the Finnish courts seeking to prevent logging taking place had been successful. While mindful of the need to examine whether the judicial remedies in question were available and effective in practical terms, the Committee had insufficient information before it in terms of the numbers of actions brought, the arguments invoked and their outcomes to conclude that the judicial remedies invoked by the State party were ineffective. Accordingly, this portion of the communication was considered inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

6.6 Taking into account the authors' contention that they had suffered a significant reduction in the number of reindeer that they are permitted to raise in their herding areas, the Committee considered that the parts of the communication that have not been found inadmissible for lack of standing or failure to exhaust domestic remedies had been substantiated, for purposes of admissibility.

6.7 On 1 April 2003, the Committee declared the communication admissible insofar as it relates to the cumulative effects on the exercise by Jouni and Eino Länsman of their rights under article 27 of the Covenant arising from the logging that had taken place in the Pyhäjärvi, Kirkko-outa and Paadarskaidi areas, along with the proposed logging in Kippalrova.

The State party's merits submission

7.1 On 1 October 2003, the State party submitted comments on the merits and requested the Committee to review its previous decision on admissibility for failure to exhaust domestic remedies. It recalls that complex questions such as the issue of the alleged effects of logging proceedings in the present case must and can be thoroughly investigated, for example through expert and witness testimonies, on-site inspections and specific information on local circumstances. It is unlikely that all the necessary information could be obtained outside national court proceedings. The present case does not show any special circumstances which might have absolved the authors from the requirement of exhausting the domestic remedies at their disposal. The authors could take a civil action for damages against the State in a District Court at first instance, if necessary, on appeal in the Court of Appeal, and subject to leave to appeal in the Supreme Court.

7.2 On the merits, the State party acknowledges that the Sami community is an ethnic community within the meaning of article 27, and that the authors, as members of that community, are entitled to protection under this provision. It reviews the Committee's jurisprudence on article 27 of the Covenant,[4] and concedes that the concept of "culture" within the meaning of article 27 covers reindeer husbandry, as an essential component of the Sami culture.

7.3 The State party admits that "culture" within the meaning of article 27 provides for protection of the traditional means of livelihood for national minorities, in so far as they are essential to the culture and necessary for its survival. Not every measure or its consequences, which in some way modify the previous conditions, can be construed as a prohibited interference with the right of minorities to enjoy their own culture. The State party refers to general comment on article 27, adopted in April 1994, which acknowledges that the protection of rights under article 27 is directed to ensuring "the survival and continued development of the cultural, religious and social identity of the minorities concerned" (para. 9). It invokes the *ratio decidendi* of the Committee's Views in *I. Länsman et al. v. Finland*,[5] where the Committee held that States parties may wish to encourage economic development and allow economic activity, and that measures which have a certain limited impact on the way of life of persons belonging to a minority do not necessarily violate article 27.

7.4 The State party notes that the areas referred to in the communication is owned by the State and under the administration of the National Forestry and Park Service which is entitled, inter alia, to log forests and construct roads at its discretion - with due regard to the relevant provisions of national legislation and international treaties. In the State party's view, due care was exercised for all logging operations carried out in State-owned forests in northern Finland. In the past few years, logging operations have mainly been carried out for the purposes of thinning forests to ensure proper growth.

7.5 The State party points out that the size of the territory administered by the Muotkatunturi Herdsmen's Committee is relevant. The surface of the land area administered by the Herdsmen's Committee is approximately 248,000 hectares, of which some 16,100 hectares of forests (about 6 per cent of the land areas administered by the Committee) are used for the purposes of forestry on State-owned lands. In fact, there have been very few logging operations in the area, the surface of the lands subject to logging amounting to approximately 1.2 per cent of the area administered by the Committee. The operations carried out in this territory between 1983 and 2001 amounted to 152 hectares per year, whereas the planned logging operations to take place between 2003 and 2012 would amount to 115 hectares per year. In view of the total surface of forest areas, both the logging operations carried out and the planned ones are less extensive than those carried out in private forests in the area. While reindeer owners have required the National Forest and Park Service to terminate forestry activities in the land areas administered by the Committee, they did not reduce their own logging operations.

7.6 The State party denies that any new logging operations have been planned for the Angeli area (Pyhäjärvi and Kirkko-outa), nor have any such operations been carried out in or planned for the area of Kippalrova. The State party observes that as far as the admissible part of the complaint with regard to the Paadarskaidi area is concerned, the National Forest and Park Service mainly carried out increment felling (preparative cutting), in the area, amounting to approximately 110 hectares in 1998.

7.7 The logging operations in Pyhäjärvi in 1996 (170 hectares) and in 1999 (regeneration fellings over 60 hectares), as well as operations in Kirkko-outa in 1998 (regeneration fellings amounting to 70 hectares and thinning amounting to 200 hectares) were already taken into account by the Human Rights Committee on 22 November 1996. The Committee had considered the logging operations which had been carried out by the date of the decision, as well as planned future operations in the Angeli area. According to the decision, there was no violation of article 27 of the Covenant. It observes that the regeneration fellings (300 hectares) in the Angeli area constitute 0.8 per cent and the thinning logging operations (200 hectares) constitute 0.5 per cent of the forest, administered by the Muotkatunturi Herdsmen's Committee.

7.8 As to the effects of logging on reindeer herding, the State party notes that it has not been shown that the effects of the earlier logging operations were more than anticipated. Nor was it shown that logging operations would create long-lasting harm preventing the authors from continuing reindeer herding in the area at its present extent. It observes that the effects of forestry should not be examined in the short term or in respect of individual logging sites, but from a wider perspective. According to a statement given by the Finnish Game and Fisheries Research Institute on 31 January 2002, the operations referred to in the communication do not have any significant additional adverse effects on reindeer herding in the long term if the numbers of reindeer are maintained approximately at their present level. In view of the state of winter herding areas, the present number of reindeer is high.

7.9 The State party notes that because of the severe conditions of nature in the area administered by the Herdsmen's Committee, provisions for the purposes of preserving nature and the environment are included, among others, in section 21 of the Reindeer Herding Act, which provides that the Ministry of Agriculture and Forestry shall determine the maximum number of reindeer that the Herdsmen's Committee may keep in their herds, as well as the number of reindeer that may be owned by individual Committee members. In the determination of the maximum numbers of reindeer, the principle enshrined in section 21, subsection 2, is applied according to which the number of reindeer in the herds on the lands administered by the Committee may not exceed the sustainable productive capacity of the winter pastures.

7.10 Even after the reductions of the maximum number of reindeer by the Ministry of Agriculture and Forestry in 1998/1999 and 2000/2001, the maximum number of reindeer allowed is more than three times the numbers allowed in the 1970s. In 1973, the number was no more than 1,051, whereas the highest number in 1990 was 10,398. The State party argues that the significant increase in the number of reindeer kept in herds in the 1980s and 1990s had adverse effects on the state of winter herding pastures. The high numbers of reindeer kept by the Herdsmen's Committee in their herds and the resulting adverse effects on herding lands, increase the need for additional feeding, thereby harming the reindeer husbandry. The State party adds that apart from the number of reindeers per herd, the difficulties of reindeer herdsmen and the poor state of herding lands are not so much affected by forestry as they are by other forms of forest use. For the State party, the Ministry's decision on the permitted number of reindeer does not alone constitute any substantiated evidence of the effects of certain individual loggings, but rather of the effects of the high numbers of reindeer kept in herds.

7.11 The State party submits that there has been regular contact between the authorities and the Herdsmen's Committee in the form of letters, negotiations and even various on-site visits. It notes that irrespective of whether the owner is the State or an individual citizen, the possible restrictions resulting from the right of the Sami, other Finns or nationals of other European Economic Area countries, to carry out reindeer herding cannot entirely deprive landowners of their own rights. It is also observed that reindeer herdsmen's committees within the Sami often have a mixed composition of both Sami and other Finns as their members. The relevant provisions of the Finnish Constitution are based on the principle that both population groups have, as performers of professional activities, equal status before the law and neither group may be placed in a more favourable position than the other, not even in respect of reindeer herding.

Authors' comments

8.1 On 5 December 2003, the authors commented on the State party's submission. They dispute the claim that they may institute civil proceedings for damages against the State party. According to section 1 of chapter 5 of the Finnish Damages and Tort Liability Act of 1974, "damages shall constitute compensation for the personal injury and damage to property. Where the injury or damage has been caused by an act punishable by law or in the exercise of public authority, or in other cases, where there are especially weighty reasons for the same, damages shall also constitute compensation for economic loss that is not connected to personal injury or damage to property." The National Forest and Park Service, which caused the damage, does not exercise public authority and the logging operations are not a criminal offence. Thus, compensation for financial damage could arise under the Act only if there are "especially weighty reasons". The application of the concept of "especially weighty reasons" in Finnish case law has caused problems of interpretation, and "it is by no means clear that the provision could be applied to the damage to the authors". In any event, such a process of litigation would be laborious, onerous and the costs prohibitive. The litigation would take several years to complete.

8.2 The authors contest the State party's denial that it intends to carry out logging in Kippalrova and provides a map which it purports to prove otherwise. In October 2003 the National Forest and Park Service announced that it was preparing a further logging plan in Paadarskaidi.

8.3 As to the logging operations undertaken in the entire territory, the authors submit that the territory covered by the Herdsmen's Committee is not homogeneous forest but is made up of different types of grazing land. Even though the National Forest and Park Service engages in forestry in only part of the area administered by the Committee, 35 per cent of the forest pastures in the winter grazing area and 48 per cent of those in the summer grazing area are subject to forestry operations by the State and private owners. According to the current land demarcation for forestry and statements made by the National Forest and Park Service, the area in question will sooner or later be absorbed into the felling cycle. The felling cycle involves a wide range of measures, even the least invasive of which cause harm to reindeer husbandry. Nine per cent of the entire territory of the Committee is privately owned, and the owners are not subject to the same obligations as the State with respect to reindeer husbandry.

8.4 The National Forest and Park Service invited the Herdsmen's Committee on two field trips in Kippalvaara and Kippalrova in September 2001 and Savonvaara-Pontikkamäki in January 2002, at which herdsmen expressed their opposition to the logging proposals. Nevertheless, the operations started in the Savonvaara-Pontikkamäki region (not part of the current communication) in the early spring of 2002. In October 2003, the National Forest and Park Service announced that logging will take place there in the near future.

8.5 On the issue of participation of the Herdsmen's Committee, while the National Forest and Park Service arranged a hearing which the Committee members and other interested groups could attend, this hearing was, in practice, merely an exercise in opinion gathering. In the authors' view, the National Forest and Park Service determines the principles, strategies and objectives of its forestry operations exclusively according to its own needs; as its decisions are not open to appeal, this fails to ensure effective participation.

8.6 As to the effects of logging, the authors refer to several investigations, studies and Committee reports which have been prepared since the previous *Länsman* case, and which purportedly attest to the substantial damage caused by the logging operations. An inventory of Alectoria lichen was conducted in the territory of the Lapland Herdsman's Committee in 1999 to 2000, in which it confirmed that the incidence of Alectoria lichen in the logged forest areas is very low, and that logging operations cause considerable harm to reindeer husbandry. Similar results were found in other reports, including various Swedish studies published in 1998 and 2000. In addition, the Finnish Ministry of Agriculture and Forestry, in considering the maximum permissible population of reindeer per herd, acknowledged the importance and availability of winter nutrition for reindeer - Lichenes, Alectoria and Deschampsia - and that logging has reduced stocks of the former two foods.

8.7 It is submitted that after logging, as reindeer do not remain grazing on managed areas, grazing pressure comes to bear on the remaining territory. This means that the effects of logging also extend beyond the areas that are actually managed. The authors argue that the impact of logging operations are long-term, practically permanent, and that the measures employed create new damage, exacerbate existing damage, and extent the area affected by logging. Since the logging operations, the access of reindeer to winter food has become more susceptible to other variations in the Pyhäjärvi, and Kirkko-outa areas, including those arising from natural phenomena, such as heavy snow cover, delays in the arrival of spring and an increase in predators, especially wolves.

8.8 On the State party's argument that according to the Finnish Game and Fisheries Research Institute, "the loggings referred to in the communication do not have significant additional adverse effects on reindeer herding in the long term if the numbers of reindeer are maintained approximately at their same level", the authors submit that the State party omitted the last line of the opinion "... and the deterioration in pastures is compensated by feeding. If, on the other hand, the aim is to engage in reindeer husbandry based purely on natural pastures, then loggings - even those notified as relatively mild - will be of greater significance for reindeer husbandry that is already in difficulties for other reasons". The authors refer to the view of the Lapland and Kemin-Sompio Herdsmen Committee's who have previously stated that artificial feeding causes inequalities and disputes within the Herdsmen's Committee, and is regarded as a threat to the old Sami tradition and culture of reindeer husbandry. In recent years, because of the lack of natural winter food, the authors have had to rely on artificial reindeer food which requires additional income from sources other than reindeer husbandry, thereby impacting on the profitability of this form of livelihood.

8.9 The authors acknowledge that over the last two years, conditions have been favourable from the point of view of securing natural food supplies, resulting in a substantial reduction in expenses for additional feeding and the survival rate of reindeer beyond expectation. Despite these conditions, the profitability of reindeer husbandry has not improved, as the companies buying reindeer meat have reduced their prices by up to 30 per cent and have purchased less. In addition, the State collects a penalty fee if the Herdsmen's Committee exceeds its quota of reindeer per herd on account of failure to sell.

Review of admissibility

9.1 The Human Rights Committee has examined the communication in light of all the information made available to it by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

9.2 As to the State party's request to review admissibility on the grounds that the authors did not take a civil action for damages and thus did not exhaust domestic remedies, the Committee considers that in the present case where the issue is the effect of past logging, the State party has not demonstrated that an action for damages would be an effective remedy to address all relevant aspects of the State party's responsibility under article 27 of the Covenant to protect the right of minorities to enjoy their own culture and with respect to a claim that this culture has been or is being destroyed. For this reason, the Committee does not intend to reconsider its admissibility decision.

9.3 As to the claim, that the negative effects of the proposed logging in Kippalrova would interfere with their rights under article 27, the Committee recognizes the commitment of the State party, expressed in its submission on the merits, not to proceed to logging in this area and therefore finds it unnecessary to consider the possibility of future logging, by the State, in this area any further.

9.4 The Committee proceeds to a consideration of the merits of the claims relating to the effects of past logging in the Pyhäjärvi, Kirkko-outa and Paadarskaidi areas.

Consideration of the merits

10.1 As to the claims relating to the effects of logging in the Pyhäjärvi, Kirkko-outa and Paadarskaidi areas of the territory administered by the Muotkatunturi Herdsmen's Committee, the Committee notes that it is undisputed that the authors are members of a minority within the meaning of article 27 of the Covenant and as such have the right to enjoy their own culture. It is also undisputed that reindeer husbandry is an essential element of their culture and that economic activities may come within the ambit of article 27, if they are an essential element of the culture of an ethnic community.[6] Article 27 requires that a member of a minority shall not be denied the right to enjoy his culture. Measures whose impact amounts to a denial of the right are incompatible with the obligations under article 27. As noted by the Committee in its Views on case No. 511/1992 of *Länsman et al. v. Finland*, however, measures with only a limited impact on the way of life and livelihood of persons belonging to a minority will not necessarily amount to a denial of the rights under article 27.

10.2 The Committee recalls that in the earlier case No. 511/1992, which related to the Pyhäjärvi and Kirkko-outa areas, it did not find a violation of article 27, but stated that if logging to be carried out was approved on a larger scale than that already envisaged or if it could be shown that the effects of logging already planned were more serious than can be foreseen at present, then it may have to be considered whether it would constitute a violation of article 27. In weighing the effects of logging, or indeed any other measures taken by a State party which has an impact on a minority's culture, the Committee notes that the infringement of a minority's right to enjoy their own culture, as provided for in article 27, may result from the combined effects of a series of actions or measures taken by a State party over a period of time and in more than one area of the State occupied by that minority. Thus, the Committee must consider the overall effects of such measures on the ability of the minority concerned to continue to enjoy their culture. In the present case, and taking into account the specific elements brought to its attention, it must consider the effects of these measures not at one particular point in time - either immediately before or after the measures are carried out - but the effects of past, present and planned future logging on the authors' ability to enjoy their culture in community with other members of their group.

10.3 The authors and the State party disagree on the effects of the logging in the areas in question. Both express divergent views on all developments that have taken place since the logging in these areas, including the reasons behind the Minister's decision to reduce the number of reindeer kept per herd: while the authors attribute the reduction to the logging, the State party invoke the overall increase in reindeer threatening the sustainability of reindeer husbandry generally. While the Committee notes the reference made by the authors to a report by the Finish Game and Fisheries Research Institute that "loggings - even those notified as relatively mild - will be of greater significance for reindeer husbandry" if such husbandry is based on natural pastures only (supra 8.8), it also takes note of the fact that not only this report but also numerous other references in the material in front of it mention other factors explaining why reindeer husbandry remains of low economic profitability. It also takes into consideration that despite difficulties the overall number of reindeers still remains relatively high. For these reasons, the Committee concludes that the effects of logging carried out in the Pyhäjärvi, Kirkko-outa and Paadarskaidi areas have not been shown to be serious enough as to amount to a denial of the authors' right to enjoy their own culture in community with other members of their group under article 27 of the Covenant.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before the Committee do not reveal a breach of article 27 of the Covenant.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] Case No. 671/1995.

[2] Para 10.1 provides, as relevant: "The issue to be determined is whether logging of forests in an area covering approximately 3,000 hectares of the area of the Muotkatunturi Herdsmen's Committee (of which the authors are members) - i.e. such logging as has already been carried out and future logging - violates the authors' rights under article 27 of the Covenant."

[3] See, for example, *Hartikainen v. Finland*, case No. 40/1978, decision adopted on 9 April 1981, *J.T. v. Canada*, case No. 104/1981, decision adopted on 6 April 1983, and *Ominayak et al. v. Canada*, op. cit.

[4] Views on cases Nos. 167/1984 (*B. Ominayak and members of the Lubicon Lake Band v. Canada*), 197/1985 (*Kitok v. Sweden*) and 511/1992 (*I. Länsman v. Finland*).

[5] Supra.

[6] Views on case No. 197/1985 (*Kitok v. Sweden*), Views adopted 27 July 1988, para. 9.2; on case No. 511/1992 (*I. Länsman et al. v. Finland*), adopted 26 October 1994, para. 9.2.

L. Communication No. 1061/2002, *Fijalkovska v. Poland* (Views adopted on 26 July 2005, eighty-fourth session)*

Submitted by: Bozena Fijalkowska (not represented by counsel)

Alleged victim: The author

State party: Poland

Date of communication: 19 August 1999 (initial submission)

Decision on admissibility: 9 March 2004

Subject matter: Arbitrary detention in psychiatric institution

Procedural issues: Request from Committee to State party for further information on the merits in admissibility decision

Substantive issues: Arbitrary detention; right to take proceedings before court to challenge lawfulness of detention

Articles of the Covenant: 9; 14

Articles of the Optional Protocol: 2

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 26 July 2005,

Having concluded its consideration of communication No. 1061/2002, submitted to the Human Rights Committee by Bozena Fijalkowska under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen and Ms. Ruth Wedgwood.

Pursuant to rule 90 of the Committee's rules of procedure, Committee member Mr. Roman Wieruszewski did not participate in the adoption of the present Views.

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Ms. Bozena Fijalkowska, a Polish citizen, currently residing in Torun, Poland. She claims to be a victim of a violation by Poland of article 7 of the International Covenant on Civil and Political Rights. The case also appears to raise issues under articles 9 and 14 of the Covenant. She is not represented by counsel.

Factual background

2.1 The author has been suffering from schizophrenic paranoia since 1986. On 12 February 1998, she was committed to the Provincial Psychiatric Therapeutic Centre (hereinafter the "psychiatric institution") in Torun. She was committed under article 29 of the Law on Psychiatric Health Protection, by order of the Torun District Court of 5 February 1998.

2.2 On 29 April 1998, the author was permitted to leave the psychiatric institution, but continued her treatment as an outpatient; treatment was completed on 22 July 1998.

2.3 On 1 June 1998, the author went to the court registry to examine her case file and requested copies of the transcript of the court hearing and decision of 5 February 1998. She received a copy of the decision on 18 June 1998 at the psychiatric institution. On 24 June 1998, she lodged an appeal against the Torun District Court's decision of 5 February 1998. On 26 June 1998, the Regional Court dismissed her appeal as she had missed the statutory deadline.[1]

2.4 On 1 July 1998, the author applied to the Regional Court to establish a new time limit for lodging her appeal. On 16 September 1998, the Regional Court refused her request. On 19 October 1998, the Torun Provincial Court similarly rejected the author's appeal against the decision of the Regional Court. The decision contained instructions on how to appeal to the Supreme Court.

2.5 On 24 November 1998 and following a decision of the Provincial Court of 20 October 1998, the author was assigned a legal aid lawyer to prepare her appeal to the Supreme Court. On 21 April 1999, the Supreme Court rejected the author's appeal.

2.6 On 1 September 1999, the Supreme Court rejected, for lack of competence, the author's request to review the constitutionality of the provisions of the Law on Psychiatric Health Protection.

The complaint

3. The author claims that her committal to a psychiatric institution against her will amounted to a violation of article 7 of the Covenant. In particular, she claims that provisions of the Mental Health Protection Act, under which the decision to confine her was taken, are incompatible with article 7 of the Covenant. She also claims that during her detention the treatment she received amounted to cruel, inhuman or degrading treatment.

State party's submission on admissibility and merits and author's comment thereon

4.1 By submission of 11 September 2002, the State party submitted that the communication is inadmissible for failure to exhaust domestic remedies. It argued that the author could have filed a constitutional complaint pursuant to article 79 (1)[2] of the new Polish Constitution of 2 April 1997. Her claim that confinement to a psychiatric institution without her consent amounted to cruel, inhuman and degrading treatment could have been examined as an infringement of her rights under articles 39, 40, and 41[3] of the Constitution. Such a complaint would have tested the constitutionality of article 29[4] of the Mental Health Protection Act 1994.

4.2 On the merits and in particular the alleged violation of article 7, the State party noted that the author does not raise any complaints about ill-treatment during her compulsory hospitalization, but simply considered that confinement to a psychiatric institution by the court, without her free consent, in itself, amounts to a violation of article 7.

4.3 The State party considered the communication to be "manifestly ill-founded", and noted that on 17 December 1997, the author's sister had requested the Torun District Court, under article 29 of the Mental Health Protection Act, to commit the author to a psychiatric institution as she suffered from schizophrenia. She had previously been hospitalized from 29 November 1996 to 18 February 1997, when her illness was brought under control. However, a few weeks after her discharge from hospital, her state of health deteriorated as she stopped taking her medication. She also became aggressive. In support of her application, the author's sister submitted a medical certificate issued by a psychiatrist, who stated that failure to confine the author to a psychiatric institution would cause serious deterioration of her mental health. He also confirmed that such treatment would help improve her mental health.

4.4 On 17 December 1997, and in order to corroborate the evidence submitted by the author's sister, the Torun District Court ordered that the author be independently examined. On 22 December 1997, the court-appointed medical expert informed the court that the author had not appeared when summoned for the examination. On the same day, the court ordered the author to appear for an examination on 30 December 1997. The author again ignored the summons. The court scheduled another psychiatric examination for 12 January 1998; on that day, the author was escorted to the examination by the police.

4.5 The expert who conducted the examination concluded that the author needed treatment in a psychiatric institution. On 5 February 1998 and on the basis of this evidence, the Torun District Court ordered the author's committal. The author failed to appear in court. Thus, the State party argued that there were serious grounds for subjecting the author to compulsory treatment and the decision was taken in accordance with the relevant provisions of Polish law. It concluded that the author has not submitted any reliable arguments in support of her submission concerning allegedly cruel, inhuman or degrading treatment.

4.6 On 30 January 2003, the author reiterated her previous claims and maintained that she has exhausted domestic remedies.

State party's supplementary submission

5. By submission of 16 December 2003 and following a request by the Secretariat for further clarification of the facts of the case, the State party submitted the following information on the author's legal representation: the author did not request the court to grant her legal counsel until the Torun Regional Court refused her request to extend the time limit to lodge an appeal against the decision of the District Court. On 20 October 1998, the Regional Court granted her request and on 24 November 1998, the Regional Bar Association appointed counsel

for the author. The State party argued that legal representation is not obligatory and that the author "as a person enjoying full capacity for legal deeds could successfully plead her case before the courts by herself." In this context, it referred to the decision of the Supreme Court of 21 April 1999, which held that, in the circumstances of the case, a lawyer was not necessary as the author "enjoyed full capacity of legal deeds" and "mental illness cannot be equated to a lack of legal capacity."

Committee's admissibility decision

6.1 During its eightieth session, the Committee considered the admissibility of the communication.

6.2 The Committee noted the author's claim that her commitment to the psychiatric institution against her will violated article 7 of the Covenant, and that the treatment she received during her confinement also violated article 7. The Committee noted that the author had provided no arguments or further information to demonstrate how her rights under the provision had been violated and reiterated that a mere allegation that the Covenant had been violated is insufficient to substantiate a claim under the Optional Protocol. Consequently, the Committee considered both of these claims inadmissible, under article 2 of the Optional Protocol.

6.3 Notwithstanding the above, the Committee considered that the facts before it raised issues under the Covenant that were admissible and should be considered on the merits. The Committee noted that the circumstances under which the author was committed to a psychiatric institution, in particular the fact that she was committed without legal representation and without receiving a copy of the committal order until 18 June 1998, more than four months after the order was issued and after the expiry of the deadline to file an appeal, may raise issues under articles 9 and 14 of the Covenant.

6.4 On 9 March 2004, the Human Rights Committee decided that the communication was admissible in so far as it appeared to raises issues under articles 9 and 14 of the Covenant. The State party was requested to comment on whether the author's detention was conducted in accordance with procedures "established by law" pursuant to article 9 of the Covenant and, if submitted to be lawful, whether the failure to provide her with legal representation and with a copy of the committal order at the time of her committal and only after expiry of the deadline for lodging an appeal, amounted to arbitrary detention pursuant to article 9. It was also requested to comment on whether the procedures established by law and their application in the instant case amounted to a violation of article 14 of the Covenant.

State party's merits submission

7.1 On 1 October 2004, the State party responded to the Committee's request for information and submitted that the case does not raise issues under articles 9 or 14 of the Covenant and that there were no violations of the Covenant in this case. As to whether the author's detention was conducted in accordance with procedures "established by law" pursuant to article 9, the State party submits that the complainant's confinement in a psychiatric institution from 12 February until 29 April 1998 was conducted in accordance with the procedure provided for in the Mental Health Protection Act of 1994, and in particular with article 29, which stipulates that:

"1. A person mentally ill may also be confined to psychiatric hospital, without the consent required in article 22:

> (1) Whose hitherto behaviour has indicated that a failure to confine him/her to hospital will cause substantial deterioration of his/her state of mental health,
>
> (2) Who is unable to provide by himself/herself his/her basic needs, and it is justified to anticipate that treatment in psychiatric hospital will bring about improvement of his/her state of health.

2. A custody court competent as to the place of residence of that person is to decide on a need of confinement to a psychiatric hospital of a person as described in paragraph 1, without his/her consent - upon a request of his/her spouse, relatives in direct line, siblings, his/her statutory representative or person exercising effective custody of him/her."

7.2 According to the State party, it was under this provision of the Mental Health Protection Act that the Torun District Court restricted the author's right to liberty by the decision of 5 February 1998. The committal order was at the request of the author's sister and followed a hearing at which an expert psychiatrist gave evidence. The State party submits that the decision of the Torun District Court was in compliance with the relevant provisions of Polish law and thus within the meaning of a "procedure as is established in law" pursuant to article 9, paragraph 1.

7.3 As to whether the failure to provide the complainant with legal representation and with a copy of the committal order at the time of her committal and only after expiry of the deadline for lodging an appeal, amounted to arbitrary detention pursuant to article 9, the State party observes that there was no legal obligation to provide the author with legal representation at the time of examining by the Torun District Court. Thus, the State party argues, no such obligation may be inferred from article 9. It refers to the Supreme Court's opinion that "mental illness cannot be equated to a lack of legal capacity". The complainant was neither incapacitated nor unable to discern the nature of her actions, including possible consequences of her failure to appear before the Torun District Court at the hearing on 5 February 1998. She deliberately chose not to participate in that hearing by refusing to be served a summons and a psychiatrist's opinion. In addition, the State party submits that the author herself did not request the court to grant her legal counsel during the consideration of her case by the Torun District Court.

7.4 As regards the date of providing the complainant with a copy of the committal order, the State party notes that according to article 357 § 1 of the Code of Civil Procedure: "The court shall attach the reasons to the rulings pronounced at a public hearing only when they are subject to an interlocutory appeal and only upon a demand from a party, lodged within one week of the date of the pronouncement of the ruling. These rulings shall be served only on the party which demanded the drawing up of the reasons and service of the ruling with reasons." Therefore, as the author only requested a copy of the decision on 1 June 1998, four months after it was handed down, the Court was not obliged to send a copy of the decision together with the reasons for the decision ex officio. In the State party's view, the prohibition of arbitrary detention in article 9 does not imply an obligation to serve judicial decisions concerning the committal of an individual to a psychiatric institution automatically on the person concerned.

7.5 The State party denies that the procedures established by law and their application in the instant case amounted to a violation of article 14. The author's committal to a psychiatric institution was ordered by a competent, independent and impartial court established by law. The Court adopted its decision having heard an expert psychiatrist, and having carefully examined the grounds for the author's committal provided in the Mental Health Protection Act. The other judicial procedures in the instant case, i.e. concerning the author's motion for establishing a new time limit for lodging an appeal, fulfilled all the guarantees enshrined in article 14. Her motion was considered by both the Torun District Court and the Torun Provincial Court and sufficient reasons were adduced for not allowing the complainant's motion. Moreover, the author has also availed herself of the cassation procedure in the Supreme Court, which decided on 21 April 1999 that the complaint was unfounded.

Consideration of the merits

8.1 The Human Rights Committee has examined the communication in light of all the information made available to it by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

8.2 As to whether the State party violated article 9 of the Covenant by committing the author to a psychiatric institution, the Committee notes its prior jurisprudence that treatment in a psychiatric institution against the will of the patient constitutes a form of deprivation of liberty that falls under the terms of article 9 of the Covenant.[5] As to whether the committal was lawful, the Committee notes that it was carried out in accordance with the relevant articles of the Mental Health Protection Act and was, thus, lawfully carried out.

8.3 Concerning the possible arbitrary nature of the author's committal, the Committee finds it difficult to reconcile the State party's view that although the author was recognized, in accordance with the Act, to suffer from deteriorating mental health and inability to provide for her basic needs, she was at the same time considered to be legally capable of acting on her own behalf. As to the State party's argument that "mental illness cannot be equated to a lack of legal capacity", the Committee considers that confinement of an individual to a psychiatric institution amounts to an acknowledgement of that individual's diminished capacity, legal and otherwise. The Committee considers that the State party has a particular obligation to protect vulnerable persons within its jurisdiction, including the mentally impaired. It considers that as the author suffered from diminished capacity that might have affected her ability to take part effectively in the proceedings herself, the court should have been in a position to ensure that she was assisted or represented in a way sufficient to safeguard her rights throughout the proceedings. The Committee considers that the author's sister was not in a position to provide such assistance or representation, as she had herself requested the committal order in the first place. The Committee acknowledges that circumstances may arise in which an individual's mental health is so impaired that so as to avoid harm to the individual or others, the issuance of a committal order, without assistance or representation sufficient to safeguard her rights, may be unavoidable. In the present case, no such special circumstances have been advanced. For these reasons, the Committee finds that the author's committal was arbitrary under article 9, paragraph 1, of the Covenant.

8.4 The Committee further notes that although a committal order may be appealed to a court, thereby allowing the individual to challenge the order, in this case, the author, who had not even been served with a copy of the order, nor been assisted or represented by anyone during the hearing who could have informed her of such a possibility, had to wait until after her release before becoming aware of the possibility of, and actually pursuing, such an appeal. Her appeal was ultimately dismissed as having been filed outside the statutory deadline. In the Committee's view, the author's right to challenge her detention was rendered ineffective by the State party's failure to serve the committal order on her prior to the deadline to lodge an appeal. Therefore, in the circumstances of the case, the Committee, finds a violation of article 9, paragraph 4, of the Covenant.

8.5 In light of a finding of a violation of article 9, the Committee need not consider whether there was also a violation of article 14 of the Covenant.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the State party has violated article 9, paragraphs 1 and 4, of the International Covenant on Civil and Political Rights.

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an adequate remedy, including compensation, and to make such legislative changes as are necessary to avoid similar violations in the future. The State party is under an obligation to avoid similar violations in the future.

11. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2, of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] According to the decision, dated 26 June 1998, of the Regional Court, the statutory deadline was 26 February 1998.

[2] This article provides that "In accordance with principles specified by statute, everyone whose constitutional freedoms or rights have been infringed shall have the right to appeal to the Constitutional Court for a judgement on the conformity with the Constitution of the statute or another normative act upon which basis a court or organ of public administration has given a final decision on his freedoms, rights or obligations as specified in the Constitution."

[3] Articles 39 provides that, "No one shall be subjected to scientific experimentation, including medical experimentation, without his voluntary consent."

> Article 40 provides that, "No one may be subjected to torture or cruel, inhuman, or degrading treatment or punishment. The application of corporal punishment shall be prohibited."
>
> Article 41 provides, "1. Personal inviolability and security shall be ensured to everyone. Any deprivation or limitation of liberty may be imposed only in accordance with principles and under procedures specified by statute."

[4] Article 29 provides "1. A person mentally ill may also be confined to psychiatric hospital, without the consent required in article 22; a. Whose hitherto behaviour have indicated that a failure to confine him/her to hospital will cause substantial deterioration of his/her state of health, b. who is unable to provide by himself/herself his/her basic needs, and it is justified to anticipate that treatment in a psychiatric hospital will bring about improvement of his/her state of health."

[5] Communication No. 754/1997, *A. v. New Zealand*, Views adopted on 15 July 1999.

M. Communication No. 1073/2002, *Terrón v. Spain*
(Views adopted on 5 November 2004, eighty-second session)*

Submitted by:	Jesús Terrón (represented by counsel, Ms. Antonia Mateo Moreno)
Alleged victim:	The author
State party:	Spain
Date of submission:	13 February 2001 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 5 November 2004,

Having concluded its consideration of communication No. 1073/2002, submitted by Mr. Jesús Terrón under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication of 13 February 2001 is Jesús Terrón, of Spanish nationality, born in 1957. He claims to be a victim of violations of article 2, paragraph 3 (a), article 14, paragraph 5, and article 26 of the Covenant. The Optional Protocol entered into force for the State party on 25 April 1985. The author is represented by counsel.

The facts as submitted

2.1 The author was a member of the Regional Assembly (*Cortes*) of Castilla-La Mancha. He was tried by the Supreme Court for forging of a private document and sentenced on 6 October 1994 to two years' imprisonment and 100,000 pesetas in compensation.

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* The following members of the Committee took part in the discussion of the communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen and Mr. Maxwell Yalden.

2.2 The author did not submit an application for *amparo* (enforcement of constitutional rights) with the Constitutional Court, considering that it would serve no purpose in view of the Court's repeated denial of applications for *amparo* for the purpose of reviewing facts established in the judgements of the ordinary courts.

The complaint

3.1 The author claims that his right to the review of his conviction and sentence by a higher tribunal (article 14, paragraph 5, of the Covenant) was violated since he was tried by the highest ordinary criminal court, the Supreme Court, whose judgements are not susceptible to judicial review. He alleges that his right to file an effective remedy (article 2, paragraph 3 (a) of the Covenant) in respect of the sentence handed down at first instance was violated.

3.2 The author claims that he was the victim of a violation of article 26 of the Covenant, owing to a difference in treatment in Spanish legislation to do with which courts hear cases involving a member of the *Cortes* (Parliament). If a Madrid member of Parliament commits an offence in Madrid, or a member of a regional Parliament commits an offence in that region, he has the right to be tried by the High Court of Justice of the jurisdiction in question and may then submit an application for judicial review to the Supreme Court. A member of a regional Parliament who commits an offence in Madrid is tried directly by the Supreme Court and has no right to apply for judicial review. In the author's view, this difference in treatment is discriminatory.

3.3 As regards the requirement that domestic remedies must be exhausted, the author maintains that it was pointless to apply to the Constitutional Court for *amparo*. He states that the Constitutional Court has repeatedly held it has no authority to review sentences handed down by the ordinary courts and is not competent to revisit facts established in judicial proceedings since this is expressly prohibited by law. The author further asserts that the inadequacy of the remedy of *amparo* is demonstrated by the Constitutional Court's consistently held view that the special guarantees associated with membership of the *Cortes* and Senate excuse the lack of a second level of jurisdiction.

Observations of the State party on admissibility and merits

4.1 The State party contends that the communication is inadmissible since domestic remedies have not been exhausted. According to the State party, the author should have submitted an application for *amparo* to the Constitutional Court.

4.2 The State party attaches a document stating that the first lawyer who defended the author in domestic proceedings was found guilty at first instance of conducting a negligent defence, not having submitted an application for *amparo*. The author's first lawyer declared that applying for *amparo* had been proposed, but he had instead submitted an application for judicial review which had been declared inadmissible. The court which found the lawyer guilty considered that he should have known that the time allowed for applying for *amparo* continued to run if his application for judicial review was clearly inadmissible, and concluded accordingly that his conduct was negligent. The proceedings in the domestic courts against the author's first lawyer were brought by the person acting as the author's representative before the Committee. In the State party's view, such action by the author's representative is inconsistent with the author's claim that there was no need to submit an application for *amparo*.

4.3 On the merits, the State party contends that article 14, paragraph 5, of the Covenant does not apply when an individual is tried at first instance by the court of highest jurisdiction, for example, the Supreme Court, because of his personal situation. In the author's case, he was tried by the Supreme Court because he held a publicly elected post. In the State party's view, the author, as a member of the *Cortes*, occupied a different position from that of the majority of defendants, and was therefore to be treated differently. The State party considers that judgement at sole instance by the court of highest jurisdiction is the consequence of the purely objective circumstance of occupying a specific public post. It also considers that the absence of a review of sentence is counterbalanced by trial by the court of highest jurisdiction.

4.4 The State party contends that this is a frequent situation in many States and that it is equally common to have procedures for waiving the immunity of certain persons in public posts when they face criminal charges.

4.5 The State party points out that the Statute of Autonomy of Castilla-La Mancha, approved by Organization Act 9/1982 of 10 August 1982, provides in article 10.3 for the prosecution of members of Parliament and stipulates that "it shall in all cases be incumbent on the High Court of the region to decide whether to indict, imprison, prosecute or try them. Outside the region, they may be held to account in the same way before the Criminal Division of the Supreme Court". The State party maintains that the author never objected to being tried at sole instance, and did so only once he had been sentenced. He further enjoyed all the guarantees of a fair trial and was able to challenge all the evidence submitted against him.

4.6 The State party considers that in cases of very minor offences the establishment of a review procedure in a higher court is self-defeating, in view of the cost incurred and the unnecessary prolongation of proceedings. In this regard it cites article 2, paragraph 2, of Protocol No. 7 to the European Convention on Human Rights, which excepts from review cases of "offences of a minor character".

4.7 With regard to the alleged violation of article 26 of the Covenant, the State party contends that under the legislation in force, the court competent to try an offence committed by a member of Parliament within the territory he was elected to represent is the High Court of the region, while if the offence with which he is charged was committed outside his region, the Supreme Court has jurisdiction. In the State party's view, this difference of treatment is based on objective and reasonable criteria. The State party further claims that this provision is not discriminatory in that it applies to all cases in which a member of Parliament is tried for an offence committed outside the region he represents.

Author's comments on the State party's observations on admissibility and merits

5.1 With regard to the admissibility of the communication, the author acknowledges that he sued the first lawyer who defended him in the criminal proceedings against him. He says, however, that in the proceedings against him, the lawyer always maintained that the *amparo* application could not have succeeded owing to its limitations. In passing sentence, furthermore, the court made it clear that while it found the lawyer guilty of negligence, he could not be held responsible for all the consequences of the author's conviction, since *amparo* was an exceptional remedy, which, owing to its limitations, was not always effective, and under no circumstances would failure to apply for *amparo* deprive the author of a hearing at second instance and a ruling on the offence for which he had been convicted by the Supreme Court.

5.2 On the merits, the author maintains that the State party's assertion that he had a fair trial is incorrect, since during the oral proceedings his lawyer refused to call most of the witnesses for the defence.

5.3 The author insists that his conviction was based on purely circumstantial evidence and could not be reviewed by a higher tribunal because he was tried by the highest court at sole instance.

5.4 The author does not agree with the State party's argument that the absence of a review of sentence was offset by the fact that he was tried by the highest court. In the author's view, being tried by the highest court does not imply that that court cannot make mistakes that need to be reviewed by a higher tribunal.

5.5 The author contends that the arguments of the State party referring to Protocol No. 7 of the European Convention do not apply to the complaint before the Committee, since the scope of article 14, paragraph 5, of the Covenant differs considerably from that of Protocol No. 7. The State party has not entered any reservation to this provision of the Covenant.

5.6 The author insists that the difference in trial arrangements for members of Parliament established in the Organization Act is discriminatory, since if a member of the *Cortes* is charged with an offence committed in a region he has the right to a second hearing, whereas if he is charged with an offence committed in Madrid, he is judged at sole instance by the Madrid Supreme Court.

Issues and proceedings before the Committee

6.1 In accordance with rule 87 of its rules of procedure, before considering any claims contained in a communication, the Human Rights Committee must decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement, so that the provisions of article 5, paragraph 2 (a), of the Optional Protocol do not preclude its consideration of the complaint.

6.3 The State party has asserted that domestic remedies have not been exhausted since the author did not submit an application for *amparo* to the Constitutional Court. The author maintains that it was unnecessary to do so since the application stood no chance of succeeding.

The author claims that all applications for *amparo* submitted to the Constitutional Court against the Criminal Division of the Supreme Court have been denied, and repeated rulings by the Constitutional Court have established that *amparo* does not constitute a third instance or permit reappraisal of the facts or review of sentences handed down by the ordinary courts.

6.4 As proof of the failure to exhaust domestic remedies the State cited the judgement of the civil court of first instance No. 13, which shows that the author sued the first lawyer who defended him in criminal proceedings against him for damages, because the lawyer had not applied to the Constitutional Court for *amparo*. The court sentenced the lawyer to pay compensation. It found he had been negligent in allowing the deadline for applying for *amparo* to lapse and in filing another, inappropriate appeal. In the view of the Committee, this argument is not conclusive since the court, in determining the compensation payable, took account of the fact that the damage to the author was relative since *amparo* is an exceptional measure and the Constitutional Court could not have acted as a court of second instance owing to the limited scope of that remedy.

6.5 The Committee's established jurisprudence states that it is only necessary to exhaust those remedies that have some prospect of success. With regard to the alleged violation of article 14, paragraph 5, of the Covenant, the Committee notes that the State party has not contested the fact that *amparo* is not a remedy that permits a review of conviction and sentence as the Covenant requires. Nor has the State party contested the existence of precedent in the Constitutional Court establishing that the remedy of *amparo* is not to be used to reappraise facts or review sentences handed down by domestic courts. Neither has it contested the fact that, under domestic legislation, no remedies are available against convictions by the Supreme Court. The Committee considers that where the alleged violation of article 14, paragraph 5, of the Covenant is concerned, the author has exhausted the domestic remedies. The complaint raises points that may affect the right recognized in article 14, paragraph 5, of the Covenant, rendering this part of the communication admissible.

6.6 The Committee's established jurisprudence states that article 14, paragraph 5, of the Covenant is a *lex specialis* in relation to article 2, paragraph 3 (a) of the Covenant, such that since the Committee has decided that the alleged violation of article 14, paragraph 5, is admissible, it is unnecessary for it to take a decision on the alleged violation of article 2, paragraph 3, of the Covenant.

6.7 With regard to the alleged violation of article 26 of the Covenant, the author asserts that the distinction established in domestic legislation as to which court is competent to hear proceedings involving members of Parliament is discriminatory because in some cases the individual concerned has the right to review of sentence by a higher tribunal while in others he is tried at sole instance with no possibility of a review. The State party says that the distinction is established in law which applies throughout the country and in all cases where a member of Parliament is put on trial for an offence committed outside the region he was elected to represent. The Committee considers that the author has substantiated this claim sufficiently for the purpose of admissibility, and that the matter appears to raise issues of relevance under article 26 of the Covenant. The Committee therefore finds this part of the communication admissible.

Consideration on the merits

7.1 The Committee must decide whether the author's conviction at first instance by the Supreme Court with no possibility of review of the conviction and sentence constitutes a violation of article 14, paragraph 5, of the Covenant.

7.2 The State party contends that in the case of minor offences, the requirement of review by a higher tribunal is not applicable. The Committee recalls that the right set out in article 14, paragraph 5, refers to all individuals convicted for an offence. It is true that the Spanish text of article 14, paragraph 5, refers to *"un delito"*, while the English text refers to a *"crime"* and the French text refers to *"une infraction"*. Nevertheless the Committee is of the view that the sentence imposed on the author is serious enough in any circumstances to justify review by a higher tribunal.

7.3 The State party claims that the author at no time objected to being subject to the jurisdiction of the Supreme Court; it was only when found guilty that he contested the lack of the possibility of a second hearing. The Committee cannot accept this argument since the author's being tried by the Supreme Court did not depend on his wishes but was established by the criminal procedure of the State party.

7.4 The State party contends that in situations such as the author's, if an individual is tried by the highest ordinary criminal court, the guarantee set out in article 14, paragraph 5, of the Covenant does not apply; the absence of a right to review by a higher tribunal is offset by the fact of being tried by the highest court, and this situation is common in many States parties to the Covenant. Article 14, paragraph 5, of the Covenant stipulates that everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law. The Committee points out that "according to law" is not intended to mean that the very existence of a right to review is left to the discretion of the States parties. Although the State party's legislation provides in certain circumstances for the trial of an individual, because of his position, by a higher court than would normally be the case, this circumstance alone cannot impair the defendant's right to review of his conviction and sentence by a court. The Committee accordingly concludes that there has been a violation of article 14, paragraph 5, of the Covenant with regard to the facts submitted in the communication.

7.5 Having concluded that the State party violated article 14, paragraph 5, of the Covenant, the Committee deems it unnecessary to consider whether there has been a violation of article 26 of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 14, paragraph 5, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is required to furnish the author with an effective remedy, including adequate compensation.

10.	In becoming a party to the Optional Protocol, Spain recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in the event that a violation has been established. The Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

N. Communication No. 1076/2002, *Olavi v. Finland*
(Views adopted on 15 March 2005, eighty-third session)[*]

Submitted by:	Riitta-Liisa Kasper and Illka Olavi Sopanen (represented by counsel, Mr. Martti Tapio Juvonen)
Alleged victim:	The authors
State party:	Finland
Date of communication:	25 April 1997 (initial submission)
Subject matter:	Equal treatment in relation to compensation for expropriation of property
Procedural issues:	Exhaustion of domestic remedies, abuse of right of submission
Substantive issues:	Disclosure of names of judges participating in court decision; equal treatment in relation to compensation for expropriation of property
Articles of the Covenant:	14 (1), 26
Articles of the Optional Protocol:	3, 5 (2) (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 15 March 2005,

Having concluded its consideration of communication No. 1076/2002, submitted to the Human Rights Committee on behalf of Riitta-Liisa Kasper and Illka Olavi Sopanen, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication, and the State party,

Adopts the following:

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[*] The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Views under article 5, paragraph 4, of the Optional Protocol

1. The authors of the communication are Riitta-Liisa Kasper and Ilkka Olavi Sopanen, both Finnish nationals. They claim to be victims of a violation of articles 2, paragraph 1, 3, 14, paragraph 1, and 26 of the International Covenant on Civil and Political Rights. They are represented by counsel, Mr. Martti Tapio Juvonen.

Factual background

2.1 On 26 March 1987, the Council of State authorized the expropriation of part of the authors' lands (covering 65.97 hectares). The expropriated area forms part of the larger area of Linnansaari National Park. On 18 February 1988, the Expropriation Commission issued an expropriation order and defined the amount to be paid.

2.2 The authors state that their lands were expropriated by the Government at a price considerably below the current price in comparison with voluntary purchases and other expropriations in the region.

2.3 The authors' appeal against this decision was rejected by the Court of Eastern Finland on 20 September 1989. The Land Court did not revise the amount of compensation. On 4 May 1990, the Supreme Court rejected the authors leave to appeal.

2.4 A petition for reversal was then lodged with the Supreme Court. The Supreme Court heard the petition and by decision of 1 December 1993 held that the authors had not been able to invoke new facts or evidence likely to lead to another outcome and therefore dismissed the application. With this, all domestic remedies are said to have been exhausted.

2.5 The authors state that while considering their petition, the Supreme Court asked the National Board of Survey for an opinion in the matter. The Board's opinion concluded that the authors had not received equal treatment in comparison with expropriations in the same region for the same purpose. Nevertheless, the Supreme Court dismissed the authors' appeal.

2.6 The authors further state that the Supreme Court's judgement does not disclose the names of the judges who participated in the decision making, making it impossible to consider any grounds for disqualifying them.

2.7 The authors' application to the European Commission of Human Rights was declared inadmissible *ratione temporis* on 29 February 1996.

The complaint

3. The authors argue that their rights under articles 2, paragraph 1, 3, and 26 of the Covenant have been violated because they did not receive equal treatment in relation to the compensation paid for expropriated land property. They also claim to be victims of a violation of article 14, paragraph 1, of the Covenant, because of the failure of the Supreme Court to disclose the names of the judges participating in the decision on their application.

State party's submissions on the admissibility and merits of the communication

4.1 By submission of 23 July 2002, the State party challenges the admissibility of the communication. The State party argues that the Supreme Court's decision of 4 May 1990, rejecting the authors' request for leave to appeal, is the final decision in the case. It notes that the reversal procedure initiated by the authors and leading to the Supreme Court's decision of 1 December 1993 is an extraordinary appeal. The State party observes that thus seven years had passed since domestic remedies were exhausted before the authors presented their case to the Human Rights Committee.

4.2 The State party notes that the Optional Protocol does not include a special time limit for the presentation of communications to the Committee. Nevertheless, the State party argues that the length of time which has passed since the issue of the final national decision should be taken into account when determining the admissibility of a communication.

4.3 The State party further argues that, to the extent that the authors intend to complain about interference with their right to property, the communication is inadmissible *ratione materiae*.

5.1 By submission of 25 November 2002, the State party raises an additional objection to the admissibility of the authors' claim under article 14 of the Covenant. The State party argues that this claim is inadmissible as incompatible with the provisions of the Covenant, as the Covenant does not contain a right to the review of a judgement in a civil case nor any right to extraordinary appeal.

5.2 As to the merits of the communication, the State party refers to the legal provisions regulating expropriation of immovable property and its compensation. The Act on the Expropriation of Immovable Property and Special Rights (603/1977) provides that a property owner is entitled to full compensation for the financial losses caused by the expropriation (section 29 of the Act). Section 30 (1) of the Act provides: "Full compensation, corresponding to the market value, shall be determined for the expropriated property. The moment of property transfer shall be decisive for the determination of this value. If the market value does not reflect the real loss suffered by the owner of the property or any related right, the assessment shall be based on the returns from the property or the investments in it."

5.3 The State party argues that as a result of these provisions, the value of different properties may vary even if they are situated close to each other, depending on their characteristics and their suitability for recreational use. The assessment of the value shall normally be based on reliable statistical evidence on the prices normally paid for comparable pieces of land.

5.4 With regard to the authors' claim under article 14, paragraph 1, of the Covenant, the State party notes that the present case concerned a request for reversal of judgement, requiring new and important evidence. The State party notes that the authors have not claimed that they had no possibility to submit all the evidence. The Supreme Court, after having evaluated all evidence before it, concluded that there were no new circumstances or evidence presented by the authors that would likely have led to a different result. As a consequence the Supreme Court did not reverse the judgement. The State party observes that the fact that the outcome was not what the authors had wished, does not mean that the judicial proceedings were unfair.

5.5 In respect to the authors' claim that the names of the judges who participated in the decision were not disclosed, the State party notes that it was possible to get the names of those judges participating in the decision by contacting the Registry of the Supreme Court and that this information was thus publicly available. The State party concludes that there has thus been no violation of article 14, paragraph 1, of the Covenant in the instant case. The State party adds that at present, the names of the judges are mentioned on the written judgements.

5.6 In respect to the authors' claim under article 26 of the Covenant, the State party notes that the expropriation of the land had been determined on the basis of statistics available on the prices paid for comparable pieces of land at the time of the expropriation. The State party notes that the Supreme Court, in its decision of 1 December 1993, noted that the report of the National Board of Survey did not indicate that the compensation had been incorrectly calculated. The Supreme Court also considered that the authors had not presented any evidence that would have given reason to find that they had not been treated equally. The State party argues that differences in prices do not as such render a decision incorrect or discriminatory. The State party concludes that there has been no violation of article 26 of the Covenant in the present case.

Authors' comments on the State party's submissions

6. On 4 March 2003, the authors comment on the State party's submission. They argue that their communication is admissible. As to the merits, they reiterate that the National Board of Survey was of the opinion that they had not received equal treatment in comparison with expropriations in the same region for the same purpose.

The Committee's admissibility consideration

7.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

7.2 The Committee notes that the authors have exhausted all domestic remedies available to them. It may also be noted that the authors presented their communication a year after the European Commission on Human Rights declared their application inadmissible *ratione temporis*. The Committee considers that in the present case, having regard to its particular circumstances, it is not possible to consider the time that passed before the communication was filed was so unreasonable as to make the complaint an abuse of the right of submission.

7.3 As regards the authors' claim that they were not treated equally in relation to the compensation paid for expropriated land property, in violation of article 26 of the Covenant, the Committee notes that the Supreme Court, after having examined all the evidence before it, including the report of the National Board of Survey to which the authors refer, concluded that there was not sufficient evidence to prove that the authors were treated contrary to the equality principle enshrined in the Constitution. The Committee recalls that it is normally for the courts of States parties, and not for the Committee, to evaluate facts and evidence in a particular case. In the instant case, the Committee, having examined the Supreme Court's decision, is of the opinion that the decision is not manifestly arbitrary or ill-founded. Consequently, the Committee finds this claim inadmissible under article 2 of the Optional Protocol.

7.4 As regards the remaining claim of a violation of article 14, paragraph 1, of the Covenant, the Committee is of the view that it is admissible and proceeds to consider it on the merits.

Consideration of the merits

8.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

8.2 In respect to the authors' claim that they are the victims of a violation of article 14, paragraph 1 of the Covenant, the Committee notes the State party's explanation, which has not been contested by the authors, that the authors could at any time have requested the names of the judges participating in the decision from the Registry of the Supreme Court. The Committee therefore considers that the facts before it do not reveal any violation of article 14, paragraph 1 of the Covenant.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it do not disclose a violation of any of the provisions of the International Covenant on Civil and Political Rights.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

O. Communication No. 1089/2002, *Rouse v. The Philippines* (Views adopted on 25 July 2005, eighty-fourth session)*

Submitted by:	Leon R. Rouse (not represented by counsel)
Alleged victim:	The authors
State party:	The Philippines
Date of communication:	10 June 2002 (initial submission)
Subject matter:	Fair trial and equality of arms in child abuse trial
Procedural issues:	None
Substantive issues:	Fair and impartial trial; equality of arms; presumption of innocence; ability to cross-examine witnesses; undue delay in proceedings, review by a higher tribunal according to law, arbitrary arrest and detention, failure to provide medical treatment as a form of torture
Articles of the Covenant:	7; 9, paragraph 1; and 14, paragraphs 1, 2, 3 (a), (c), (d) and (e), and 5
Articles of the Optional Protocol:	2, 3

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 July 2005,

Having concluded its consideration of communication No. 1089/2002, submitted to the Human Rights Committee by Leon R. Rouse under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication dated 21 June 2002 is Leon R. Rouse, an American citizen who, at the time of the initial submission was detained at Bilibid Prison in Muntinlupa City in the Philippines. He was released and deported to the United States of America on 29 September 2003. He claims to be a victim of violations by the Philippines[1] of articles 7, 14, paragraphs 1, 2, 3 (a), (c), (d) and (e), 5, and article 9, paragraph 1, of the International Covenant on Civil and Political Rights (the Covenant). He is not represented by counsel.

Factual background

2.1 During a visit to the Philippines, the author was arrested, on 4 October 1995, for alleged sexual relations with a male minor and for a violation of the Child Abuse Law, which criminalizes sexual acts between an adult and a person under the age of 18. Although the police proposed bribes in return for dismissing the case, the author, claiming that he was innocent, chose to face trial.

2.2 The author claims that he was set up and framed by the police. Around noon on the day of arrest, he arrived at Pichay Lodging House, where he saw Harty Dancel, a former acquaintance, accompanied by two individuals, Pedro Augustin and Godfrey Domingo. The four of them had lunch in a restaurant, where Dancel offered Godfrey to have sex with the author. The author refused, arguing that the latter was too young, even after Dancel insisted and assured him he had reached the age of majority.

2.3 Later in the day, the same three persons waited for the author at his hotel. Dancel had them invited to the author's room. After the author had taken a shower, Dancel and Augustin left the room, leaving him alone with Godfrey. The latter requested to use the bathroom, where he undressed. When there were knocks on the door, the author opened, and police officers entered. At that moment, neither the author nor Godfrey wore clothes.

2.4 The author was arrested without a warrant; he and Godfrey were taken to the police station, where Godfrey Domingo (hereafter referred to as the alleged victim) signed a sworn statement, witnessed by his parents, and filed a complaint against the author. He claimed that he was 15 years old and that the author had prompted him into sexual acts. In subsequent interviews, the alleged victim told the same story to Assistant City Prosecutor Aurelio, to one Dr. Caday, and two social workers.

2.5 Dr. Caday, who examined and interviewed the alleged victim after the incident, concluded in a medical certificate that the victim claimed to have been sodomized, but that the examination neither confirmed nor contradicted this statement.

2.6 On 11 October 1995, the alleged victim, assisted by his parents, signed an affidavit of desistance, confirming the version of the facts as related by the author, and admitted that he had been part of a set-up organized by police officers Augustin and Dancel. It transpires from the judgement of the Court of Appeal, that in this document, the alleged victim also stated that he was 18 years old when the author was arrested.

2.7 On 19 October, the author was charged with child abuse, under article III, section 5, paragraph b, of Republic Act 7610, otherwise known as "Special Protection of Children against Child Abuse, Exploitation and Discrimination Act". On 23 October, on arraignment, the author pleaded not guilty; that same day, he filed a petition for bail. On 10 November, the Regional Trial Court of Laoag City, Branch II (hereafter referred to as the Trial Court) ruled that "the petition for bail had been overtaken by the fact that the prosecution was about to terminate the presentation of its evidence".

2.8 Despite a subpoena order against the alleged victim and his parents, they did not appear in hearings on 31 October and 10 November 1995.

2.9 On 7 December 1995, the author filed a demurrer to the evidence, mainly based on the fact that the prosecution rested its case on the statements made to others by the alleged victim, who was the only eyewitness of the events and who, despite a subpoena order, was not present for cross-examination. The demurrer also pointed out the inconsistencies in the testimonies of the other witnesses and the illegality of the arrest, and invoked the principle of presumption of innocence. The Court was asked to dismiss the case for insufficiency of evidence.

2.10 On 22 January 1996, before the author had submitted his defence statement, the Trial Court issued a pretrial order dismissing the demurrer to evidence for lack of merit, and found that "the evidence for the prosecution [was] sufficient to prove the guilt of the accused beyond reasonable doubt of the crime charged against him." The prosecution had presented the following circumstantial evidence: 1. A 21-year-old witness had reported that he and the author had engaged in sexual activities the day before the arrest, and the Court found that, despite his age, "his physical appearance shows that he looks like a minor". The Trial Court based its order on such assessment of evidence, although it had not even been offered as evidence by the prosecution, and the author had no opportunity to defend himself against the charge. 2. The police had found the author and the alleged victim naked in the hotel room when entering it. 3. The alleged victim had told the same story consistently to two social workers, the medical officer who examined him, and the Assistant City Prosecutor. The Court considered that these accounts by the alleged victim, although made out of court, were not simple hearsay.

2.11 On 2 February, the author filed a motion for reconsideration, claiming that, in the absence of testimony of the alleged victim, the testimonies of the other prosecution witnesses constituted hearsay, and that there was no proof of the minor age of the victim.

2.12 On 11 March, the Trial Court dismissed the motion for reconsideration for lack of merit.

2.13 On 26 March, the author filed a petition for certiorari to the Court of Appeal, seeking to annul the order of the Trial Court, dismissing the demurrer to evidence of 22 January 1996, as well as the order of the same court of 11 March 1996, which denied the motion for reconsideration. The author based his petition on the deprivation of his right to confront or cross-examine witnesses against him and the alleged illegality of his arrest and of the search of his room, conducted without a warrant.

2.14 The author provides copies of the comments of the Solicitor General to the Appeal Brief, and his own reply to the Solicitor General's comments. In his comments, the Solicitor General argues that there was no need to prove the fact of actual sodomy of the alleged victim, as a different section of Act 7610, section 10 (b), article VI, penalizes "any person who shall keep or have in his company a minor, 12 years or under or who is 10 years or more his junior in any public or private place, hotel (...)". The Solicitor General argued that "the mere fact that the petitioner was found keeping in his company Domingo (...) who is younger than him by 24 years (...) raises the presumption that there was, at least, the commission of other acts of child abuse". The author recalls that he was charged for a violation of article III, section 5, paragraph b, of Act 7610, and not section 10 (b), article VI.

2.15 On 24 September 1996, the Court of Appeal dismissed the petition for certiorari, "which clearly suffered from procedural infirmity", as the author had not presented his contradicting evidence, and because the pretrial testimonies of the alleged victim were properly characterized as circumstantial evidence. The Court found that the evidence presented by the prosecution "may yet suffice to establish the lesser offence defined and penalized under section 10 (b) of the statute". The Court also found that the alleged illegality of the author's arrest only affected the admission into evidence of the pictures taken in the hotel room at the time of the arrest.

2.16 On 29 October 1996, the author filed a motion for reconsideration against the Court of Appeal's decision. He submits a copy of the comments of the Solicitor General, and his own reply to these comments.

2.17 On 12 February 1997, the Court of Appeal dismissed the author's motion for reconsideration.

2.18 On 20 March 1997, the author filed a Petition for Review in the Supreme Court, which dismissed it on 23 July 1997, for "failure by the petitioner to sufficiently show that the respondent court had committed any reversible error in rendering the questioned judgement".

2.19 On 12 January 1998, the Trial Court found that "the admission of Godfrey Domingo on what transpired between him and the accused which he repeatedly related to the different public officers immediately after the incident (...) cannot be overcome by the affidavit of desistance executed by Godfrey Domingo assisted by his parents", because the alleged victim was not in court to confirm the contents of the document. The Court ruled that the affidavit of desistance should be considered as hearsay, and had no probative value. It found the author guilty beyond reasonable doubt of the crime charged against him. He was sentenced to serve a penalty of 10 years, 2 months and 21 days, as a minimum, to 17 years, 4 months and 1 day maximum, of imprisonment.

2.20 The author appealed to the Court of Appeal which upheld the conviction on 18 August 1999. The Court of Appeal based its decision on the following grounds. On the issue of the age of the alleged victim, the Court of Appeal considered that "the trial court did not commit any error in not giving probative value to [the] affidavit of desistance because the well-known rule is that retractions are generally unreliable and are looked upon with considerable disfavour by the courts". On the issue that the alleged victim did not appear in court for cross-examination, the Court of Appeal considered that this case constituted an exception to the general rule of non admissibility of hearsay evidence, because the alleged victim's statements took place immediately after the alleged facts, and were therefore natural and spontaneous. On the contradicting versions of the facts and testimonies of witnesses of the prosecution and the defence, the Court ruled that the issue of credibility of witnesses was an issue under the competence of the trial court. As a result, the decision of the Trial Court was affirmed.

2.21 The author further appealed to the Supreme Court on 3 September 1999. The Solicitor General commented on the appeal on 21 January 2000, further to which the author replied on 25 May 2000. This was the last submission of the author to the Supreme Court. The author's appeal was dismissed by the Supreme Court on 10 February 2003, on the ground that it did not raise a point of law. After a motion for reconsideration thereof on 7 March 2003, the Supreme Court dismissed the author's appeal, on the same grounds. This decision, dated 23 April 2003, states that "this denial is FINAL".

2.22 From 2001, while in prison, the author allegedly experienced extensive suffering provoked by kidney stones. The author reports that all scheduled tests at an outside hospital were postponed for administrative reasons not imputable to the author (failure of the guards to come to work, lack of authorization of the Department of Justice, insufficient requests from the prison's doctors). As a result, the requisite tests were not made and the author did not receive an effective diagnosis and treatment. He submits a copy of a medical certificate dated 13 March 2003, resulting from a medical examination performed that day, recommending that the author be granted conditional pardon and voluntary deportation so that a thorough examination and possible operation could be done in the United States.

2.23 On 26 October 2003, the author informed the Committee that he had been released on 29 September 2003 and deported to the United States, after spending eight years in prison.

The complaint

3.1 The author claims that he is a victim of a violation of article 14, paragraphs 1, 2, 3 (a), (c), (d) and (e), 5; article 9, paragraph 1; and article 7 of the Covenant, as he did not receive a fair trial, was the victim of arbitrary arrest and as a result suffered torture, inhuman or degrading treatment in prison.

3.2 The author alleges a violation of article 14, paragraph 1, and the principle of equality before the courts. He submits a copy of a release order in another case, issued by the same court, three days after the order dismissing the author's demurrer to evidence. In that case, the Trial Court had ordered the release of a man accused of repeatedly raping a minor girl, because the victim had made an affidavit of desistance, and because she did not appear in Court. The Court found that there was no way the prosecution could prove the guilt of the accused beyond reasonable doubt. The author contends that his case should have been treated the same way.

3.3 The author claims that he is a victim of a violation of the right to a fair hearing by an impartial tribunal. He refers to the findings of the judge and claims that her evaluation of the evidence in the case was partial, and that she overlooked serious inconsistencies in the police officers' testimonies, as well as her choice and interpretation of national jurisprudence, was arbitrary and not impartial. In particular, he refers to a judgement of the Supreme Court used by the judge to underpin her order of 22 January 1996; in this judgement, the Supreme Court ruled that the admission of guilt by an accused through another person is not considered hearsay and is admissible in evidence. In the author's case, the judge used the "admissions" (in fact accusations) of the alleged victim and ruled that for the same reasons as in the above-mentioned judgement, these were not hearsay. The author affirms that this jurisprudence can only be relied on in case of confession of the accused, and that he never confessed. He also argues that the evidence based on what the alleged victim had told police officers, social workers and the doctor was not considered hearsay and thus admissible evidence, whereas the affidavit of desistance signed by the alleged victim, and the testimony of the district public attorney who administered it, was considered hearsay by the judge, because the alleged victim had not come to court to confirm its contents. The affidavit of desistance was considered not to have any probative value. To the author, this further confirms that the judge was partial and prejudiced.

3.4 The author claims that he was a victim of a violation of article 14, paragraph 2, as the presumption of innocence was not applied to him. He refers to the order of the Trial Court of 22 January 1996 (see paragraph 2.10 above), and recalls that this order was issued before he was able to present any defence arguments. He also claims that the inconsistencies in the police officers' testimonies cast serious doubt on their credibility, and that the court was presented with two conflicting versions of the facts. The author argues that the accused should receive the benefit of any doubt and that, instead, the court gave the benefit of doubt to the prosecution and convicted him, in violation of the principle of presumption of innocence.

3.5 The author alleges various violations of article 14, paragraph 3. He refers to the decision of the Court of Appeal of 24 September 1996, in which the Court ruled that he could be found guilty of a minor offence of child abuse, sanctioned in a different section of the law than the one he was charged for. He argues that this is contrary to his right to be informed of the nature and cause of the charge against him (art. 14, para. 3 (a)) and that this prevented him from preparing a defence on this point. However, the author seems to have dropped this claim in a later submission, as he was not found guilty of this offence.

3.6 The author further claims to be a victim of a violation of article 14, paragraph 3 (c), protecting the right to be tried without undue delay, as the Supreme Court, which has an obligation to decide a case within 24 months, only ruled on the author's appeal more than 32 months after it was submitted for its consideration, while the author was in prison.

3.7 For the author, the fact that the court based its decisions and conviction on, inter alia, the alleged youthful looks of the 21-year-old witness, a fact that was never presented as evidence by the prosecution, deprived him of his right to defend himself (art. 14, para. 3 (d)).

3.8 The author claims to be a victim of a violation of his right to examine, or have examined, the witnesses against him (art. 14, para. 3 (e)), as the alleged victim, who was the only eyewitness of the events which led to his conviction, was never present in court for cross-examination.

3.9 The author contends that by summarily dismissing his appeal, which contained questions of law, the Supreme Court denied him his right to have his conviction reviewed by a higher tribunal according to law (art. 14, para. 5).

3.10 The author claims a violation of article 9, paragraph 1, and his right to be free from arbitrary arrest and detention, as he was arrested without a warrant, and his application for bail was refused because his application had been overtaken by events, in that the prosecution was about to terminate its investigation.

3.11 The author finally claims to be a victim of a violation of article 7, of both physical and emotional torture or cruel, inhuman and degrading treatment or punishment. He argues that the serious pain he started suffering in 2001 due to his kidney problems, and the fact that he was not able to do the necessary tests and receive a proper diagnosis and treatment, constituted torture or inhuman or degrading treatment. In this regard, he refers to the medical certificate of 13 March 2003. He also argues that the sufferings imposed by the decisions of the court, as well as denial of his request to visit his dying father, amount to emotional torture or cruel, inhuman and degrading treatment or punishment.

The State party's submission on the merits of the communication and author's comments

4.1 By note verbale of 3 November 2004, the State party made its submission on the merits of the communication and did not contest the admissibility of the communication. It argues that the author's defence that he was framed was not considered credible by the Trial Court and the Court of Appeal, in view of the overwhelming evidence obtained through the testimonies of the police officers who caught the author in the hotel room with the alleged victim, and the testimonies of the social workers, public prosecutor and doctor who interviewed him after the author's arrest.

4.2 The State party argues that the Supreme Court could not examine the author's appeal by certiorari and motions for reconsideration, as his claims raised issues of fact and not points of law. The Supreme Court may not decide on questions involving an examination of the probative value of the evidence presented by the litigants.

4.3 The State party rejects the allegation that the author was unable to cross-examine witnesses in court. It states that he was able to, and did, confront and cross-examine the police officers and social workers, who had also signed the complaint against him (and were therefore also his accusers), and who testified in court.

4.4 With reference to the author's allegation of a violation of his right to equality before the courts under article 14, paragraph 1, the State party contends that the circumstances of the case of rape of a minor, referred to by the author, were completely different from those of the author's. It underlines that in that case, the private complainant desisted from further pursuing the case and did not testify before the trial court. The Supreme Court considered that the testimonies of the investigators, who repeated what the victim had told them, could not be admitted as evidence, as they constituted hearsay. The State party considers that in the present case, there were other witnesses who had personal knowledge of, and actually saw the author committing the offence, namely the police officers who caught him naked in the company of a child, who himself was naked, in a hotel room.

4.5 The State party concludes that the author was afforded a fair trial before the Trial Court.

5. On 9 March 2005, the author primarily commented on the State party's observations. He reiterates his claims and refutes the State party's argument that his conviction was based on testimonies of police officers who saw him committing the offence. He recalls that the police officers did not testify that they actually saw him commit sexual acts with the alleged victim.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that the State party has not raised any objections to the admissibility of the communication, that the author has exhausted available domestic remedies, and that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 With regard to the alleged violation of equality before the courts (art. 14, para. 1), the Committee notes that the author has complained about the outcome of the judicial proceedings, compared to the outcome of another similar case. The Committee notes that the State party contends that the circumstances of the case referred to by the author were completely different from those of the author's. The Committee further observes that article 14, paragraph 1, of the Covenant guarantees procedural equality but cannot be interpreted as guaranteeing equality of results in proceedings before the competent tribunal. This aspect of the author's communication falls outside the scope of application of article 14, paragraph 1, and is, therefore, inadmissible *ratione materiae* under article 3 of the Optional Protocol. However, the Committee notes that the communication raises issues with regard to the claim relating to the alleged violation of the right to a fair hearing by an impartial tribunal established by law and will examine that part of the claim under the same article.

6.4 With regard to the allegation of a violation of article 14, paragraph 3 (a), the Committee notes that the author was not found guilty of a different offence from the one he was charged with. This claim has thus not been substantiated for purposes of admissibility and is inadmissible, under article 2 of the Optional Protocol.

6.5 With regard to the alleged violation of article 14, paragraph 3 (d), the Committee notes that it is clear from the material before it, that the author was present at his trial and that he was afforded legal assistance. Reliance by the Court on the alleged youthful looks of the 21-year-old witness, referred to by the author to support this claim, falls outside the scope of application of article 14, paragraph 3 (d), and is, therefore, inadmissible *ratione materiae* under article 3 of the Optional Protocol.

6.6 The Committee considers that the author's remaining allegations have been sufficiently substantiated for purposes of admissibility and therefore declares the communication admissible, insofar as it raises issues under article 14, paragraphs 1, 2, 3 (c) and (e), 5; article 9, paragraph 1; and article 7 of the Covenant.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee recalls its jurisprudence that it is generally for the courts of States parties to the Covenant to evaluate facts and evidence in a particular case, unless it can be ascertained that the evaluation was clearly arbitrary or amounted to a denial of justice. In the present case, the Committee notes that the judge convicted the author inter alia on evidence that the accounts made by the alleged victim, although made out of court, were not simple hearsay. In addition, the judge did not admit the affidavit of desistance of the alleged victim as evidence while she admitted his first statement, although both were equally confirmed by witnesses who did not have a personal knowledge of the facts. Finally, the author had to overcome doubtful evidence, and even evidence that was not presented in court (the youthful looks of the 21-year-old witness, as well as the minor age of the alleged victim). In the circumstances, the Committee finds that the court's choice of admissible evidence, in particular in the absence of any evidence confirmed by the alleged victim, as well as its evaluation thereof, were clearly arbitrary, in violation of article 14, paragraph 1 of the Covenant.

7.3 In the light of this finding in respect of article 14, paragraph 1, it is not necessary to consider the claim arising under article 14, paragraph 2.

7.4 In relation to the alleged undue delays in the proceedings, the Committee notes that the Supreme Court delivered its judgement of 10 February 2003, that is over 41 months after the appeal was lodged on 3 September 1999, complemented by appeal briefs, the last of which is dated 25 May 2000. There was thus a delay of two years and eight months between the last appeal brief and the Supreme Court's judgement. Altogether, there was a delay of six and a half years between the author's arrest and the judgement of the Supreme Court. On the strength of the material before the Committee, these delays cannot be attributed to the author's appeals. In the absence of any pertinent explanation from the State party, the Committee concludes that there has been a violation of article 14, paragraph 3 (c).

7.5 As to the claim that the author was deprived of his right to cross-examine a crucial prosecution witness, the Committee notes the State party's contention that he was afforded, and took advantage, of the possibility to cross-examine the public officers who had also filed a complaint against him. However, the Committee notes that although a subpoena order had been issued to bring the alleged victim to testify in court, neither the alleged victim nor his parents could allegedly be located. The Committee further recalls that considerable weight was given to that witness' out of court statement. Considering that the author was unable to cross-examine the alleged victim, although he was the sole eyewitness to the alleged crime,[2] the Committee concludes that the author was the victim of a violation of article 14, paragraph 3 (e).

7.6 On the alleged violation of article 14, paragraph 5, the Committee notes that the author complained that the Supreme Court had denied his appeal, which he maintains contained questions of law, without examining the substance of the case, on the ground that this court only reviews questions of law. He does not complain that his sentence was not reviewed by a higher tribunal. Moreover, it transpires from the facts that the Trial Court conviction of the author was reviewed by the Court of Appeal, which is a higher tribunal within the meaning of article 14, paragraph 5. The Committee observes that this article does not guarantee review by more than one tribunal. Consequently, the Committee concludes that the facts before it do not disclose a violation of article 14, paragraph 5, of the Covenant.

7.7 In relation to the alleged violation of the right to be free from arbitrary arrest and detention, it is uncontested that the author was arrested without a warrant. The State party has neither contested this allegation nor given any justification for arresting the author without a warrant. The Committee concludes that the author was the victim of a violation of article 9, paragraph 1.

7.8 As to the author's claim under article 7, the Committee recalls that States parties are under an obligation to observe certain minimum standards of detention, which include provision of medical care and treatment for sick prisoners, in accordance with rule 22 (2) of the Standard Minimum Rules for the Treatment of Prisoners.[3] It is apparent from the author's uncontested account that he suffered from severe pain due to aggravated kidney problems, and that he was not able to obtain proper medical treatment from the prison authorities. As the author suffered such pain for a considerable amount of time, from 2001 up to his release in September 2003, the Committee finds that he was the victim of cruel and inhuman treatment in violation of article 7. In the light of this finding, it is unnecessary to consider the author's additional claim under article 7.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of articles 14, paragraphs 1 and 3 (c) and (e); 9, paragraph 1; and 7 of the International Covenant on Civil and Political Rights.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including adequate compensation, inter alia for the time of his detention and imprisonment.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not, and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] The Covenant and the Optional Protocol of the Covenant entered into force for the State party on 23 January 1987 and 22 November 1989 respectively.

[2] See communication No. 815/1998, *Dugin v. The Russian Federation*, Views adopted on 5 July 2004, para. 9.3.

[3] Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council in its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977; see *Human Rights: A Compilation of International Instruments* (United Nations publication, Sales No. E.02.XIV.4), chap. J, sect. 34.

P. Communication No. 1095/2002, *Gomariz v. Spain* (Views adopted on 22 July 2005, eighty-fourth session)*

Submitted by:	Bernardino Gomaríz Valera (represented by counsel Mr. José Luis Mazón Costa)
Alleged victim:	The author
State party:	Spain
Date of communication:	4 September 1997 (initial submission)
Subject matter:	Trial with proper judicial safeguards
Procedural issues:	Substantiation of the alleged violation - exhaustion of domestic remedies
Substantive issues:	Right to be tried without undue delay - right not to be compelled to testify against oneself or to confess guilt - right to one's conviction and sentence being reviewed by a higher tribunal according to law
Article of the Covenant:	14, paragraph 3 (c) and (g), and paragraph 5
Articles of the Optional Protocol:	2 and 5, paragraph 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 22 July 2005,

Having concluded its consideration of communication No. 1095/2002, submitted on behalf of Mr. Bernardino Gomaríz Valera under the Optional Protocol to the International Covenant on Civil and Political Rights,

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Ahmed Tawfik Khalil, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

An individual opinion signed jointly by Committee members Ms. Elisabeth Palm, Mr. Nisuke Ando, Mr. Michael O'Flaherty and a separate opinion signed by Committee member Ms. Ruth Wedgwood are appended to the present document.

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication, dated 4 September 1997, is Bernardino Gomaríz Valera, a Spanish national born in 1960. He claims to be a victim of violations by Spain of article 14, paragraph 3 (c) and (g), and paragraph 5 of the Covenant. The Optional Protocol entered into force for Spain on 25 April 1985. The author is represented by counsel, Mr. José Luis Mazón Costa.

Factual background

2.1 The author worked in sales promotion for the company Coloniales Pellicer S.A. in Murcia. On 20 January 1989, the author signed a private document acknowledging a debt to the company. Having signed the document, the author continued working for the company until May 1990, when he was dismissed. The author and the company signed a conciliation agreement before labour court No. 4 in Murcia, terminating the employment contract, and the money owed to the author in terms of salary and redundancy pay was deducted from the total debt he had acknowledged in January 1989.

2.2 The company lodged a complaint against the author for misappropriation. On 16 May 1996, the judge of criminal court No. 2 in Murcia acquitted the author. The company lodged an appeal. On 16 September 1996, the Provincial High Court sentenced the author to five months' imprisonment for misappropriation, disqualified him from public employment or office, suspended his right to vote and ordered him to pay costs.

2.3 The author lodged an *amparo* application before the Constitutional Court, which was rejected on 29 January 1997. In the application, the author alleged both violation of his right not to be compelled to testify against himself, given that the only evidence on which he was convicted was his acknowledgement of a debt to the company, and violation of his right to be tried without undue delay. Although the author had made this last claim at the beginning of the oral proceedings, in accordance with the rules governing criminal procedure, the Constitutional Court ruled that the author's claim had been lodged out of time, when the delays had ended. As to the alleged violation of the right not to confess guilt, it is clear from the Constitutional Court ruling submitted by the author that the Court concluded that the probative force of the acknowledgement of the debt had in no way affected his right not to confess guilt, given that the acknowledgment had taken place prior to the trial, and that the author did not claim to have been coerced in any way into acknowledging the debt.

The complaint

3.1 The author claims a violation of his right not to be compelled to testify against himself (article 14, paragraph 3 (g), of the Covenant) on the grounds that the only evidence on which his conviction was based was the acknowledgment of debt that he signed long before the criminal proceedings began. He claims that he was tricked into acknowledging the debt as a way of regularizing his position in the company.

3.2 The author claims a violation of his right to be tried without undue delay (article 14, paragraph 3 (c), of the Covenant), given that 3 years, 4 months and 29 days elapsed between the start of proceedings and the day of the court hearing. The complexity of the case was insufficient to justify such a delay.

3.3 The author claims a violation of article 14, paragraph 5, of the Covenant, on the grounds that he was initially convicted at second instance, by the appeal court, and was denied the right to request a review of that conviction by a higher court. Although he did not include this claim in his *amparo* application before the Constitutional Court, the author believes that it would have been futile to do so, since the rules governing criminal procedure do not envisage the possibility of appealing against a sentence that was passed by the appeal court, when that court was the first to convict the accused. According to the practice of the Constitutional Court, *amparo* applications against legal norms are inadmissible when they are brought by individuals, as opposed to the bodies authorized by the Constitution to challenge the constitutionality of laws. Furthermore, the author cited the Constitutional Court ruling of 26 June 1999, which established that a conviction by an appeal court following an acquittal by the court of first instance did not violate the right to review.

State party's observations on admissibility and on the merits

4.1 In respect of the facts reported by the author, the State party points out that the document acknowledging the debt records that the author put aside 4,725,369 pesetas without the company's knowledge or consent, and that he continued working at the company in order to pay off the debt. The author subsequently reported the theft from his house of 7 million pesetas - which he had been paid by clients of the company. The company consequently lost faith in the author, who was dismissed on 4 February 1991. A criminal investigation against him was opened thereafter.

4.2 The State party argues that domestic remedies were not exhausted in regard to the alleged violation of article 14, paragraph 3 (c), of the Covenant. It maintains that the right to trial without undue delay is protected in two ways in Spain: (i) by means of specific relief. In the case of undue delay, the person affected can complain to the court that is handling the matter. If the delay continues, the person can appeal to the Constitutional Court, which will decide whether the complaint is well-founded. If so, the Court will order an immediate end to the delay; (ii) by means of compensation. The person affected should request compensation for injury suffered as a result of the delay, in accordance with the procedure set out in the law. The European Court of Human Rights has stated repeatedly that compensation is a valid and effective domestic remedy, and the fact that use was not made of it would imply that the claim is inadmissible on the grounds that domestic remedies were not exhausted.[1] In the case of the author, the State party maintains that while the case was being investigated (3 years and 11 days), the author did not make any request for specific relief. Following the investigation, at the beginning of the trial the author invoked the alleged undue delay in the investigation, which had, by that point, ended. Given that the delay was no longer ongoing, the author should have pursued the option of compensation. Since he did not do so, his claim is inadmissible on the grounds that he did not exhaust domestic remedies.

4.3 As to the alleged violation of article 14, paragraph 3 (g), the State party maintains that the document in which the author acknowledges having appropriated the company's money pre-dates the criminal case, which is the only context in which a person's right not to be compelled to testify against himself is recognized. The author signed the document freely, and did not claim to have made the declaration in the document under any constraint or compulsion whatsoever. The document and its contents were used to acquit the author in the lower court, as the judge regarded the document as proof that the author had not intended to steal the money. The Provincial High Court set aside that ruling and concluded that there had in fact been intent to steal. The State party maintains that since the document was used in support of acquittal, it is illogical to reject it in the case of a conviction, particularly bearing in mind the author's subsequent conduct. The State party argues that this part of the complaint is inadmissible in accordance with article 3 of the Optional Protocol, and failing that, that no violation took place.

4.4 With regard to the alleged violation of article 14, paragraph 5, of the Covenant, the State party asserts that it is inadmissible on the grounds that domestic remedies were not exhausted. The State party points out that the author should have lodged an *amparo* application before the Constitutional Court. The State party adds that the author's claim that an individual cannot lodge an *amparo* application alleging that legal norms are unconstitutional is not accurate. The law clearly provides for applications for *amparo* proceedings from individuals who consider their fundamental rights to have been violated. As to the substance of this claim, the State party points out that the right to have a conviction reviewed by a higher tribunal cannot be invoked *ad absurdum*, providing the right to a third, fourth, or fifth hearing, and cites article 2, paragraph 2, of Protocol No. 7 to the European Convention on Human Rights. According to the Convention, a person's right to have his conviction reviewed by a higher tribunal may be subject to exceptions in cases in which the person was convicted following an appeal against acquittal at first instance. The State party adds that article 14, paragraph 5, of the Covenant cannot be interpreted as forbidding the prosecution to lodge appeals. The purpose of the right referred to in article 14, paragraph 5, is to avoid a breach of the right to a defence. The author's right of defence was not breached, since his claims were considered and ruled upon in accordance with the law by two separate judicial bodies. It is therefore not true to say that no review was carried out.

4.5 The State party further notes that the original claim made in September 1997 did not include the alleged violation of article 14, paragraph 5, of the Covenant, which the author first referred to in December 1999. On 23 April 2001, the author cited the Constitutional Court ruling of 28 June 1999, made two years after the original claim, to allege that it was not necessary to lodge an *amparo* application before the Constitutional Court. The State party maintains that the Constitutional Court ruling does not override the requirement to exhaust domestic remedies, enshrined in article 5, paragraph 2, of the Optional Protocol. The State party concludes that the author's claim should be declared inadmissible on the grounds that at no time did he invoke the substance of the alleged violation of article 14, paragraph 5, before the domestic courts.

Author's comments on the State party's observations

5.1 As to the alleged violation of article 14, paragraph 3 (c), of the Covenant, the author contends that the period of time that elapsed between the submission of the claim and the ruling - over three years - clearly goes against the right to be tried without undue delay.

5.2 With regard to the alleged violation of article 14, paragraph 3 (g), the author maintains that the right not to be compelled to confess guilt has implications that go beyond the prohibition of such action during the trial. The author was convicted solely on the grounds that he had, 17 months prior to making his claim, acknowledged a debt, in an attempt to resolve his differences with the company. Neither the company nor the public prosecutor brought direct evidence that the offence of misappropriation had been committed. It is clear that the document was drawn up in a climate of trust, in an effort to regularize a number of debts the author had incurred. The confession of guilt made outside the trial, in the context of a relationship of trust, cannot be the only basis on which the defendant is convicted. If it were, it would contravene the right not to be compelled to testify against oneself or to confess guilt, which includes the right not to be tricked into testifying against oneself.

5.3 As to the alleged violation of article 14, paragraph 5, of the Covenant, the author emphasizes that he was first convicted by a court of appeal. He maintains that, unlike other States parties, when Spain ratified the Covenant, it did not make a reservation that would have excluded cases in which defendants were convicted after appeals had been filed against their acquittal. He adds that the State party is obliged to guarantee a person's right to have his conviction reviewed when the first conviction is handed down at second instance. The author accepts that, owing to an error in the initial communication, he maintained that individuals could not bring *amparo* applications alleging the unconstitutionality of laws that violate fundamental rights. However, lodging an *amparo* application would have been futile because, according to the practice of the Constitutional Court, the right to review is not violated when it is the court of appeal that hands down the first conviction.

Issues and proceedings before the Committee

6.1 In accordance with rule 93 of its rules of procedure, before examining the claims made in a communication, the Human Rights Committee must decide whether or not the communication is admissible under the Optional Protocol to the International Covenant on Civil and Political Rights.

6.2 Regarding the alleged violation of article 14, paragraph 3 (g), the Committee notes that the author admits to having signed the document acknowledging his debt of his own free will,[2] before the trial against him began. In that document, he acknowledged that he had kept money belonging to the company without the company's knowledge or consent. The Committee recalls its jurisprudence that the wording of article 14, paragraph 3 (g) - i.e., that no one shall "be compelled to testify against himself or to confess guilt" - must be understood in terms of the absence of any direct or indirect physical or psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt.[3] As to the author's allegation that the document acknowledging the debt, which was obtained outside the judicial process, was the only evidence on which his conviction was based, the Committee notes that the court's ruling based the author's responsibility on his conduct before, during and after the document was signed. In the court's opinion, the author's conduct proved his intent to deceive. In accordance with the Committee's settled jurisprudence, it is not for the Committee to examine the manner in which facts and evidence have been evaluated by domestic courts, unless it was clearly arbitrary or amounted to a denial of justice, which was not the case here. The Committee concludes that the author has not substantiated the alleged violation of article 14, paragraph 3 (g), of the Covenant for purposes of admissibility, and that this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.3 As to the claim that the procedure was unduly prolonged, the Committee takes note of the State party's contention that the author could have applied for specific relief to put an end to the delay, and for compensation once the delay had ended. The Committee notes that the author has neither disputed nor dismissed the State party's assertion that recourse to compensation is an effective remedy. It therefore considers that this part of the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.[4]

6.4 As to the alleged violation of article 14, paragraph 5, of the Covenant, the Committee takes note of the author's argument that lodging an *amparo* application before the Constitutional Court would have been futile because, according to the practice of the Court, the right to review is not violated when it is the court of appeal that hands down the first conviction. In this regard, the Committee recalls its jurisprudence that it is only necessary to exhaust those remedies that have a reasonable prospect of success, and it reiterates that when the highest domestic court has ruled on the matter in dispute, thereby eliminating any prospect that a remedy before the domestic courts may succeed, the author is not obliged to exhaust domestic remedies for the purposes of the Optional Protocol.[5] In the present case, that ruling came in a slightly later case, but it tended to confirm that resort to this remedy would have been futile.

6.5 The Committee therefore declares that the author's claims under article 14, paragraph 5, are admissible, and turns to consideration of the merits.

7.1 Article 14, paragraph 5, of the Covenant stipulates that everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law. The Committee points out that that expression "according to law" is not intended to leave the very existence of a right of review to the discretion of the States parties. On the contrary, what must be understood by "according to law" is the modalities by which the review by a higher tribunal is to be carried out.[6] Article 14, paragraph 5, not only guarantees that the judgement will be placed before a higher court, as happened in the author's case, but also that the conviction will undergo a second review, which was not the case for the author. Although a person acquitted at first instance may be convicted on appeal by the higher court, this circumstance alone cannot impair the defendant's right to review of his conviction and sentence by a higher court, in the absence of a reservation by the State party. The Committee accordingly concludes that there has been a violation of article 14, paragraph 5, of the Covenant with regard to the facts submitted in the communication.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 14, paragraph 5, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is required to furnish the author with an effective remedy, including the review of his conviction by a higher tribunal.

10. By becoming a party to the Optional Protocol, Spain recognized the competence of the Committee to determine whether there has been a violation of the Covenant. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to furnish them with an effective and applicable remedy should it be proven that a violation has occurred.

The Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] European Court of Human Rights, complaint No. 39521/98, *Jesús María González Marín v. Spain*, final decision on admissibility, 5 October 1999.

[2] See paragraph 5.2 above.

[3] Communication No. 253/1987, *Kelly v. Jamaica*, decision of 8 April 1991, para. 5.5.

[4] With regard to the issue of placing the burden of proof on the author when the State party has properly demonstrated that effective remedies are available, see communication No. 1084/2002, *Bochaton v. France*, decision of 1 April 2004, para. 6.3.

[5] See, for example, communication No. 511/1992, *Länsman et al. v. Finland*, decision on admissibility, 14 October 1993, para. 6.3.

[6] Communication No. 1073/2002, *Terrón v. Spain*, decision of 5 November 2004, para. 7.4; communication No. 64/1979, *Salgar de Montejo v. Colombia*, decision of 24 March 1982, para. 10.4.

APPENDIX

Individual opinion signed by Committee members Ms. Elisabeth Palm, Mr. Nisuke Ando and Mr. Michael O'Flaherty (dissenting)

I regret that I cannot agree with the majority's finding that the author was not obliged to exhaust domestic remedies in the present case.

The author claims that it would have been futile to lodge an amparo in his case. The State party is of the opposite view. I note that the author's original claim in September 1997 did not include the allege violation of article 14, paragraph 5, of the Covenant, which the author first referred to in December 1999. In his submission on 23 April 2001, the author cited the Constitutional Court ruling of 28 June 1999 to allege that it was not necessary to lodge an *amparo* application before the Constitutional Court.

According to the Committee's jurisprudence an author only has to exhaust those remedies that have a reasonable prospect of success. Where there is a settled case law which indicates that an appeal would have been futile it is not necessary to exhaust that remedy. In the present case it was open to the author to lodge an application for *amparo* proceedings before the Constitutional Court, claiming that his fundamental right had been violated in that the rules governing criminal procedures did not envisage the possibility of appealing against a sentence that was passed by the appeal court when that court was the first to convict the accused. However, the author failed to lodge an *amparo*.

At the time when the author's case was finally decided on 29 January 1997 there existed no case law by the Constitutional Court. It was not until 26 June 1999 that the Constitutional Court ruled that a conviction by an appeal court following an acquittal by the court of first instance did not violate the right to review.

In my opinion the author cannot, for the purpose of exhaustion of domestic remedies, rely on a ruling by the Constitutional Court which was delivered nearly two and half years after his case was finally decided. As at the time there was no settled practice or case law on the issue the author should have lodged an *amparo*. He failed to do so. Accordingly, I find that he has not exhausted domestic remedies regarding his claim under article 14, paragraph 5, of the Covenant.

(*Signed*): Elisabeth Palm

(*Signed*): Nisuke Ando

(*Signed*): Michael O'Flaherty

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Individual opinion of Committee member Ms. Ruth Wedgwood

I join my colleague Elisabeth Palm in doubting the propriety of reaching the merits of the author's claim under article 14 (5) of the Covenant, because of the author's failure to exhaust domestic remedies. When the author lodged an application for *amparo* before the Constitutional Court of Spain in late 1996, he failed to include, within the stated grounds of his petition, any semblance of his current claim to the Human Rights Committee. In particular, he declined to put to the Constitutional Court any complaint that Spain's law of criminal procedure is deficient insofar as it fails to grant a full appeal from convictions rendered in a second-instance court. Indeed, the author did not address such a claim to the Human Rights Committee in his original communication in September 1997, adding the issue only in 1999. (His case was formally registered with the Committee in 2002.)

The ruling of the Constitutional Court, in a different and later case, even if it is assumed to be dispositive on the issue, should not make a difference in regard to exhaustion. For one thing, many legal systems properly decline to give retroactive effect to a new rule unless a party has previously raised the issue in the domestic courts. It is up to a party to preserve his claim by putting the issue in a timely fashion. Here, the author is represented by legal counsel, and this further justifies the ordinary application of exhaustion as a prerequisite.

Additionally, the merits of the author's claim under article 14 (5) of the Covenant may be more problematic than the Views of the Committee suggest. The Committee holds *tout courte*, see paragraph 7.1 supra, that "Although a person acquitted at first instance may be convicted on appeal by the higher court, this circumstance alone cannot impair the defendant's right to review of his conviction and sentence by a [yet] higher court." This is new ground for the Committee, and its rule, widely applied, could disrupt the court systems of many civil-law countries.

To be sure, in the legal tradition of common-law countries, an appellate court cannot disturb an acquittal below, and indeed to do so, would pose serious constitutional questions. The historic independence of the common-law jury has protected its verdicts of acquittal from any review.

But in civil law countries, including such states as Austria, Belgium, Germany, Luxembourg, and Norway, an acquittal by a court of first instance may apparently be vacated in favour of conviction, by a second-instance court sitting in review - and there may be no further appeal, as of right, from that second-instance court. The international war crimes tribunals created by the United Nations Security Council for the trial of war crimes in the former Yugoslavia and Rwanda also create the same capacity in the appellate chamber, with no further right of review.

The five European countries cited above have entered formal reservations to the International Covenant on Civil and Political Rights to preserve their right to institute convictions at the appellate stage, without further review. But as Judge Mohamed Shahabuddeen has remarked in another setting, "some of those statements lean towards interpretative declarations,"[1] i.e., they are worded as clarifications as to what the Covenant is assumed to mean in the first place.

In addition, the Committee should take account of Protocol 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which came into force on November 1, 1988. Article 2 (1) of the Protocol guarantees to any person convicted of a criminal offence "the right to have his conviction or sentence reviewed by a higher tribunal". But article 2 (2) of the Protocol also notes, as an allowable "exception" to further appeal, those cases "in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal".

Of course, the European Convention does not govern the jurisprudence of the United Nations Human Rights Committee. And the language of article 2 (2) of Protocol 7 goes beyond the text of the International Covenant on Civil and Political Rights in article 14 (5). But it is hard to imagine, as Judge Shahabuddeen has wisely remarked, that the 35 [now 36] states parties to Protocol 7 of the European Convention "intended to act at variance with any obligations under article 14 (5) of the ICCPR". In reaching its decision today, the Committee has not paused to survey to what extent the practice of those 36 states, or other signatories of the Covenant, may be at variance with the standard we apply.

In a matter so fundamental to the structure of national court systems in civil-law countries, we should give some consideration to the views of the states parties, as well as their widespread practice. This is especially so in construing the language of a Covenant provision whose drafting history is itself ambiguous, and where some states have explicitly preserved their right to continue these practices, without objection by other states parties.

Indeed, this Committee has previously opined that there is "no doubt about the international validity" of a reservation to article 14 (5) in the case of a conviction rendered in the Italian Constitutional Court, sitting as a court of first instance, with no further appeal. See *Fanali v. Italy*, No. 75/1980, at paragraph 11.6. We interpreted the Italian reservation to apply to parties not specifically mentioned within its text.

Hence, I would treat today's decision as limited to the facts and parties before us, and its rule as worthy of examination in a more comprehensive fashion at a later date.

(*Signed*): Ruth Wedgwood

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Note

[1] See separate opinion of Mohamed Shahabuddeen, in *Prosecutor v. Rutaganda*, case No. ICTR 96-3-A (International Criminal Tribunal for Rwanda, Appeals Chamber, 26 May 2003).

Q. Communication No. 1101/2002, *Alba Cabriada v. Spain* (Views adopted on 1 November 2004, eighty-second session)*

Submitted by:	José María Alba Cabriada (represented by counsel Mr. Ginés Santidrán)
Alleged victim:	The author
State party:	Spain
Date of communication:	19 June 2002 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 1 November 2004,

Having concluded its consideration of communication No. 1101/2002, submitted by José María Alba Cabriada under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is José María Alba Cabriada, a Spanish citizen, born in Algeciras, Cádiz, in 1972. He claims to be a victim of violations by Spain of article 14, paragraph 5, and article 26 of the Covenant. The Optional Protocol entered into force for the State party on 25 April 1985. The author is represented by counsel

The facts as submitted

2.1 On 4 April 1997 the Cádiz Provincial Court sentenced the author for an offence against public health to 10 years and 1 day in prison, suspension from public office, and payment of a fine of 120 million pesetas. The judgement stated that the author had been under surveillance by agents of the narcotics squad for alleged participation in the distribution of narcotic substances. The author was arrested together with an Irish citizen, from whom 2,996 tablets were confiscated containing a substance that proved to be an amphetamine derivative known as MDA. The judgement stated that the author was an intermediary for the Irish citizen in the distribution of drugs to third parties.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

2.2 The author filed an application with the Supreme Court for judicial review and annulment, alleging violation of his right to the presumption of innocence and errors in the appraisal of evidence. With regard to the presumption of innocence, the author alleged that his conviction had been based on circumstantial evidence and that the conclusions drawn by the court of first instance were not such as to preclude his innocence. Regarding errors in the appraisal of evidence, the author alleges that the court found that the confiscated substance was MDA, while a report prepared by the Ministry of Health and Consumer Affairs established that the substance was MDEA.

2.3 In a judgement dated 27 January 1999, the Supreme Court rejected the application for annulment. Regarding the alleged violation of the presumption of innocence, the Court stated that it only had a duty to consider whether there was multiple, duly verified, concomitant, mutually corroborative evidence, and that the reasoning in the court's conclusions and deductions was based on logic and experience, in order to ascertain that the logical inference made by the trial court is not irrational, capricious, absurd or extravagant, but is in accordance with the rules of logic and standards of experience. The Court stated that it was strictly prohibited from reappraising the facts that the court of first instance had considered as evidence, since, by law, the appraisal function fell within the exclusive competence of the sentencing court. With respect to the alleged error of fact in appraising the evidence, the Supreme Court stated that the Ministry of Health and Consumer Affairs had initially identified the seized substance as MDMA, but that it had turned out to be MDEA or MDA, both amphetamine derivatives.

The complaint

3.1 The author alleges a violation of the right enshrined in article 14, paragraph 5, of the Covenant, owing to the fact that the Supreme Court did not appraise the evidence. According to the author, this limitation constitutes a violation of the right to review of the judgement and conviction by a higher tribunal.

3.2 The author also alleges that the Spanish Criminal Prosecution Act violates article 14, paragraph 5, and article 26 of the Covenant, since cases involving individuals accused of the most serious crimes are tried by a single judge (examining court), who, once the relevant investigations have concluded, transfers the case to the provincial court, where proceedings are conducted by three judges, who pronounce sentence. The decision may be appealed on very limited legal grounds only. The court of cassation may not reappraise the evidence. On the other hand, cases involving individuals sentenced for lesser offences, with sentences of less than six years, are investigated by a single judge (examining court), who, when the case is ready for oral proceedings, transfers the case to a single judge ad quo (criminal court); this decision may be appealed before the provincial court, which guarantees effective review not only of application of the law but also of the facts.

3.3 The author did not make any application to the Constitutional Court for *amparo*. He maintains that the long-standing precedent of the Constitutional Court is to deny applications for *amparo*, rendering it ineffective. The author maintains that the Committee's precedent has established that it is necessary only to exhaust effective remedies actually available to the author.

Observations of the State party on admissibility and merits

4.1 The State party indicates that the author submitted his communication more than two and a half years after the Supreme Court judgement. It adds that the author made no application to the Constitutional Court for *amparo*, and sought to justify the absence of a domestic appeal by alleging the existence of extensive and varied precedent such that the remedy of *amparo* was denied, and thus ineffective.

4.2 The State party maintains that paragraph 5 of article 14 does not establish the right for an appeal court to reconduct the trial *in toto*, but the right to review by a higher tribunal of the proper conduct of the trial at first instance, with review of the application of the rules that led to the finding of guilt and the imposition of the sentence in the specific case. The object of the review is to verify that the decision at first instance is not manifestly arbitrary and that it does not constitute a denial of justice.

4.3 The State party maintains that the remedy of judicial review is based on the French system and that for historical and philosophical reasons it arose as a review limited to questions of law, and that it maintains this character in various European countries. The State party points out that the European Court of Human Rights has affirmed that States parties retain the right to determine the means for the exercise of the right to review, and may restrict such review to questions of law.

4.4 According to the State party, the Spanish remedy of judicial review is broader than the original French procedure, and complies with the requirements of article 14, paragraph 5, of the Covenant. It adds that the right to review by a second court does not include the right to reappraisal of the evidence, but means that courts of second instance examine the facts, the law and the judicial decision, and, excepting a finding of arbitrariness or denial of justice, uphold it. The State party points out that this is precisely what happened in the case of the author: the Supreme Court judgement noted the existence of evidence establishing the guilt of the author, noted that the evidence was concomitant and mutually corroborative, and ascertained that the court of first instance had considered the evidence in establishing the author's guilt and that the process of deduction had not been arbitrary but reflected the maxims of logic and experience.

4.5 The State party asserts that the Committee's Views in *Cesario Gómez Vásquez v. Spain*, could not be generalized and applied to other cases, since they were restricted to the specific case in which they were adopted. It also notes the manifest contradiction existing in international protection of the right to two levels of jurisdiction arising from the different interpretation of the European Court of Human Rights and the Human Rights Committee in respect of the same text.

4.6 The State party concludes that the alleged violation of article 14, paragraph 5, should be found inadmissible as constituting an abuse of the right to submit a communication.

4.7 With regard to the violation of article 14, paragraph 5, in connection with article 26 of the Covenant, the State party cites the Committee's Views in the *Gómez Vásquez* case, in which the Committee considered that the different treatment for different offences did not necessarily constitute discrimination. It concludes that this part of the communication should be found inadmissible, under article 2 of the Optional Protocol, since the allegation was not sufficiently substantiated.

Author's comments on the State party's observations

5.1 The author maintains that he was not required to submit an application for *amparo* before the Constitutional Court since such an appeal does not constitute an effective remedy for the violation reported to the Committee. The author observes that in his case the State party cited the text of a Supreme Court judgement in which it was expressly noted that both the Supreme Court and the Constitutional Court lacked competence to make a fresh appraisal of the facts and evidence.

5.2 The author indicates that the Committee's Views in the *Gómez Vásquez* case show the inadequacy of Spanish legislation in connection with article 14, paragraph 5, of the Covenant, and that the State party has not adopted measures to rectify that situation, despite the Committee's recommendation.

5.3 The author maintains that he has not asked the Committee to conduct an *in abstracto* review of the State party's legislation, but its inappropriateness to his specific case. He insists that the right to review includes a reappraisal of the evidence and that the Supreme Court expressly excluded that possibility, by stating that "… the Constitutional Court, on an application for *amparo*, and this review chamber, on appeal, are strictly prohibited from reappraising the basic facts and evidence, since, pursuant to article 117.3 of the Constitution and article 741 of the Criminal Prosecution Act, this function lies exclusively within the competence of the sentencing court, so that any possible reassessment of the merits of the evidence would represent an inadmissible invasion of the exclusive competence of the sentencing court". The author considers that the review by the Supreme Court was limited to formal and legal aspects of the judgement and did not constitute a comprehensive review of the judgement and conviction.

Issues and proceedings before the Committee

6.1 In accordance with rule 87 of its rules of procedure, before considering any claims contained in a communication, the Human Rights Committee must decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement, so that the provisions of article 5, paragraph 2 (a), of the Optional Protocol do not preclude its consideration of the complaint.

6.3 The State party asserts that the author waited more than two and a half years after the date of the Supreme Court judgement before submitting his complaint to the Committee. It appears to allege that the communication should be considered inadmissible as constituting an abuse of the right to submit communications under article 3 of the Optional Protocol in view of the time elapsed. The Committee observes that the Optional Protocol does not establish any deadline for the submission of communications, and that the period of time elapsing before doing so, other than in exceptional cases, does not of itself constitute an abuse of the right to submit a communication. Neither has the State party duly substantiated why it considers that a delay of more than two years would be excessive in this case.

6.4 The State party has alleged that domestic remedies have not been exhausted, since the author did not file an application for *amparo* with the Constitutional Court. The author maintains that it was not necessary to file such an application, as there was no possibility of success owing to the existence of extensive and varied precedent that denied the remedy of *amparo*, rendering it ineffective.

6.5 The Committee reaffirms its established jurisprudence that it is only necessary to exhaust those remedies that have some prospect of success. With regard to the alleged violation of article 14, paragraph 5, of the Covenant, the Committee notes that both the author and State party accept the text of the Supreme Court judgement, which states that there is a legal prohibition preventing the Constitutional Court from reappraising the facts and evidence introduced at first instance. The Committee therefore considers that an application for *amparo* could not be effective with regard to the alleged violation of article 14, paragraph 5, of the Covenant, and that the author had exhausted domestic remedies in respect of the alleged violation.

6.6 The State party also maintains that the alleged violation of article 14, paragraph 5, of the Covenant should be found inadmissible as an abuse of the right to submit communications. The Committee observes that the State party has not sufficiently substantiated its view that the author's allegations constitute an abuse of the right to submit communications, and considers that the complaint raises issues that may affect the right recognized in article 14, paragraph 5, of the Covenant, so that this part of the communication is considered admissible.

6.7 The State party asserts that the alleged violation of article 14, paragraph 5, in connection with article 26 of the Covenant, should be found inadmissible on the ground that it has not been sufficiently substantiated. The author considers that the systems of appeal existing in the State party in connection with the various types of offence make it possible in some cases to fully review the judgement while preventing it in other cases. The Committee observes that the different treatment for different remedies according to the seriousness of the offence does not necessarily constitute discrimination. The Committee considers that the author has not substantiated this part of the communication for the purposes of admissibility, in view of which it finds it inadmissible pursuant to article 2 of the Optional Protocol.

Consideration on the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information supplied by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee observes that neither the author nor the State party has disputed the facts related in connection with the alleged violation of article 14, paragraph 5, of the Covenant. The Committee observes that the Supreme Court expressly stated that it was not competent to reappraise the facts forming the basis for the conviction of the author, a function which the Court considered the exclusive and sole prerogative of the court of first instance. Further, the Supreme Court considered whether or not the presumption of innocence of the author had been violated, and ascertained that there was evidence of his guilt, that the evidence was multiple, concomitant and mutually corroborative, and that the reasoning used by the sentencing court to deduce the liability of the author on the basis of the evidence was not arbitrary, since it was based on logic and experience. It is in this context that the Committee must consider whether the review carried out by the Supreme Court is compatible with the provisions of article 14, paragraph 5, of the Covenant.

7.3 The Committee notes the comments made by the State party about the nature of the Spanish remedy of judicial review, in particular that the court of second instance is limited to an examination as to whether the findings of the trial court amount to arbitrariness or denial of justice. As the Committee has determined in previous cases [701/1996; 986/2001; 1007/2001], such limited review by a higher tribunal is not in accordance with the requirements of article 14, paragraph 5. Therefore, in the light of the limited scope of review applied by the Supreme Court in the author's case, the Committee concludes that the author is a victim of a violation of article 14, paragraph 5, of the Covenant.

8. Accordingly, the Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 14, paragraph 5, of the Covenant.

9. Under article 2, paragraph 3 (a), of the Covenant, the author is entitled to an effective remedy. The author's conviction must be reviewed in accordance with article 14, paragraph 5, of the Covenant. The State party is under an obligation to take the necessary measures to ensure that similar violations do not occur in future.

10. Considering that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective remedy in the event that a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

R. Communication No. 1104/2002, *Martínez v. Spain* (Views adopted on 29 March 2005, eighty-third session)*

Submitted by:	Antonio Martínez Fernández (represented by counsel, Mr. José Javier Uriel Batuecas)
Alleged victim:	The author
State party:	Spain
Date of communication:	1 July 2001 (initial submission)
Subject matter:	Scope of review of conviction and sentence on appeal in Spain
Procedural issues:	Same case submitted to another procedure of international settlement - reservation by the State party
Substantive issues:	Right of anyone convicted of a crime to have the conviction and sentence reviewed by a higher tribunal according to law
Article of the Covenant:	14, paragraph 5
Articles of the Optional Protocol:	2 and 5, paragraph 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 29 March 2005,

Having concluded its consideration of communication No. 1104/2002, submitted by Antonio Martínez Fernández under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication, dated 31 July 2001, is Antonio Martínez Fernández, a Spanish citizen. He claims to be the victim of a violation by Spain of article 14, paragraph 5, of the Covenant. The Optional Protocol entered into force for the State party on 25 April 1985. The author is represented by counsel, Mr. José Javier Uriel Batuecas.

Factual background

2.1 The author was a warrant officer in the Spanish army. He was sentenced by the Second Territorial Military Court on 26 March 1999, for the offence of disobedience, to 10 months' imprisonment, to suspension from official duties, and to suspension of voting rights. The author fractured his right hand in October 1995 and was placed on medical leave. In February 1996 he was ordered on three occasions to take a psychological and physical examination, but did not comply until the third time. On 1 March 1996 he was declared medically fit for duty and was told to report immediately to his military unit. Instead of complying, the author sent a number of documents certifying his temporary incapacity for duty. In late March 1996 he was again ordered to report for duty and again failed to appear, submitting instead a certificate of temporary incapacity.

2.2 The author filed an application for judicial review and annulment with the Fifth Chamber of the Supreme Court, convening as a military chamber. In the application the author referred to article 14, paragraph 5, of the Covenant. In a judgement of 29 December 1999, the Fifth Chamber rejected the appeal. Pursuant to article 325 of the Military Proceedings Act, which refers to articles 741 et seq. of the Criminal Procedure Act, the Chamber confined itself to hearing the arguments put forward in the appeal to decide whether or not they were well founded.

2.3 The author applied to the Constitutional Court for *amparo*, claiming violation of his right to review by a second court. In the application the author alleged that the Military Proceedings Act prohibited the Fifth Chamber of the Court from acting as a genuine court of appeal, in the sense of having full powers to review all past proceedings. He also referred to the Views of the Committee in the *Gómez Vásquez* case.[1] In a judgement of 9 May 2001, the Constitutional Court rejected the appeal.

2.4 On 27 July 2001, the author lodged a complaint with the European Court of Human Rights concerning the same case, also before the Committee. But on 12 September 2002, the author asked the European Court of Human Rights to withdraw his complaint, a fact which he communicated to the Committee on the same date. The secretariat of the European Court of Human Rights informed the Committee that in a decision of 3 December 2002 the Court had struck the author's complaint off the roll.

The complaint

3. The author claims that his right to have his conviction and sentence reviewed by a higher court was violated. He argues that, owing to the special nature of the appeal process, the Chamber may not hear or review the entire proceedings of the court of first instance, but only

analyse the grounds referred to by the applicant to decide whether or not they are in conformity with the law. The author asserts that the Chamber may rule only on irregularities in the judgement, and may not deal fully with the "rights" [sic] involved, but must confine itself to examining the applicant's arguments to determine whether or not they are well founded. The author maintains that there is no review by a higher tribunal, as provided for by article 14, paragraph 5, of the Covenant.

State party's observations on admissibility and merits

4.1 With regard to the admissibility of the communication, the State party maintains that there is no conclusive evidence that the European Court of Human Rights accepted the author's application to withdraw his complaint. It adds that the author has acknowledged having lodged simultaneous complaints with the Committee and the European Court of Human Rights and that this action by the author is contrary to article 5, paragraph 2 (a), of the Optional Protocol and renders the communication inadmissible. Even if proceedings before the European Court of Human Rights had concluded, they would have been conducted at the same time as proceedings before the Committee. The State party concludes that, even if the complaint before the European Court of Human Rights has been withdrawn, the reservation made under the Optional Protocol, as interpreted by the Committee in its inadmissibility decision on communication No. 1074/2002 (*Ferragut v. Spain*, decision of 28 March 2004) is applicable.

4.2 On the merits of the communication, the State party maintains that article 14, paragraph 5, does not establish the right for an appeal court to reconduct the trial *in toto*, but concerns the right to review by a higher tribunal of the proper conduct of the trial at first instance, including the application of the rules that led to the finding of guilt and the imposition of the sentence in the specific case. The object of the review is to verify that the decision at first instance is not manifestly arbitrary and that it does not constitute a denial of justice.

4.3 The State party maintains that the remedy of judicial review is based on the French system and that for historical and philosophical reasons it arose as a review limited to questions of law, and that it maintains this character in various European countries. The State party argues that the European Court of Human Rights has affirmed that States parties retain the right to determine the means for the exercise of the right to review, and may restrict such review to questions of law.

4.4 According to the State party, the Spanish remedy of judicial review is broader than the original French procedure, and complies with the requirements of article 14, paragraph 5, of the Covenant. It points out that the right to review by a second court does not include the right to reappraisal of the evidence, but means that courts of second instance examine the facts, the law and the judicial decision, and, excepting a finding of arbitrariness or denial of justice, uphold it. The State party claims that the conviction and sentence of the author were reviewed by the Supreme Court. It refers to the judgement of the Constitutional Court in the author's case, which stated that: "The applicant … failed even, beyond a mere formal statement of the law, to indicate what specific aspect of the court judgement he was prevented from having reviewed as a result of the legal nature of the application for judicial review, inasmuch as all the grounds cited by him were reviewed, and none was rejected as improper."

4.5 The State party says that the Committee's Views in *Gómez Vásquez* cannot be generalized and applied to other cases, since they are restricted to the specific case in which they were adopted. It also notes the manifest contradiction existing in international protection of the right to two levels of jurisdiction arising from the different interpretation of the European Court of Human Rights and the Human Rights Committee in respect of the same text.

Author's comments on the State party's observations on admissibility and merits

5.1 With regard to admissibility, the author informed the Committee that the European Court of Human Rights had acknowledged receipt of his application in a letter dated 21 September 2001 in which it informed him that his application might be found inadmissible, since neither article 6, paragraph 1, nor article 13 of the European Convention on Human Rights sets a requirement for various levels of jurisdiction and since Spain has not ratified Protocol No. 7 to that Convention. The Court also informed the author that his case would not be registered as a formal application until he determined whether or not he wished to maintain his complaint. The author appended a letter dated 20 December 2002 in which the European Court informed him that a panel of three judges had decided to strike his application off the roll, in accordance with article 37, paragraph 1, of the European Convention on Human Rights.

5.2 With regard to the merits, the author maintains that the placing by the European Court of Human Rights of a restrictive interpretation on the content of the right to a second level of jurisdiction should have no effect on the Committee's jurisprudence regarding the right to review of the conviction and sentence by a higher court.

5.3 The author asserts that the nature of the application for judicial review prevents consideration of the facts. Judicial review is a jurisdictional appeal intended essentially to standardize the interpretation of the law without constituting a second jurisdiction in that it does not permit review of the evidence submitted or assessment of the proof on which the sentencing court based its judgement, but is a review of legal violations of substance or form or of the assessment of the evidence in exceptional circumstances. Appeal cannot be made against the grounds for the judgement and is exceptional and confined strictly to form. The author maintains that the appeal does not permit genuine review of the conviction and sentence.

5.4 The author states that pursuant to the Committee's Views in *Gómez Vásquez*, the Second Chamber of the Supreme Court, convening in plenary session on 13 September 2000, referred to the appropriateness of initiating appeal proceedings before requesting judicial review. The author appended a copy of Act No. 19/2003, which entered into force in Spain at the end of December 2003; as mentioned in the Committee's Views in *Gómez Vásquez*, the Act generalizes a second level of jurisdiction in criminal cases, instituting appeals against judgements by provincial courts and the National High Court. The author indicates that the Act does not cover the military criminal justice system.

Issues and proceedings before the Committee

Considerations as to admissibility

6.1 In accordance with rule 93 of its rules of procedure, before considering any claim contained in a communication, the Human Rights Committee must decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 With regard to the State party's assertion that the communication is inadmissible under article 5, paragraph 2 (a), of the Optional Protocol read in conjunction with the State party's reservation to this provision of the Optional Protocol,[2] the Committee notes that the author's communication to the Committee is dated 31 July 2001, that the author submitted a complaint alleging a violation of the right to a second level of jurisdiction to the European Court of Human Rights on 27 July 2001, that the European Court did not register the complaint as a formal application, that the author requested withdrawal of the complaint on 12 September 2002, and that the European Court of Human Rights accepted the withdrawal of the complaint on 3 December 2002.

6.3 The Committee notes that the author's complaint is not being considered and has not been considered or reviewed by the European Court of Human Rights, and that it was not registered as a formal complaint but was withdrawn by the author, and that the withdrawal was accepted by the Court without consideration of the merits of the issues raised by the author. The Committee concludes that the present communication is not inadmissible under article 5, paragraph 2 (a), of the Optional Protocol and the State party's reservation thereto.

6.4 The Committee considers that the complaint raises issues relating to article 14, paragraph 5, of the Covenant; it decides that it is admissible and proceeds to a consideration of the merits.

Consideration of the merits

7. The Committee notes that the main issue in the penal case against the author was the assessment of his capacity to perform military duty, and that means an assessment of facts. The Committee further notes the comments made by the State party concerning the nature of the remedy of judicial review, in particular that the court of second instance is limited to an examination as to whether the findings of the trial court amount to arbitrariness or denial of justice. As the Committee has determined in previous cases,[3] such limited review by a higher tribunal does not meet the requirements of article 14, paragraph 5. Therefore, the Committee concludes that the author is a victim of a violation of article 14, paragraph 5, of the Covenant.

8. Accordingly, the Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 14, paragraph 5, of the Covenant.

9. Under article 2, paragraph 3 (a), of the Covenant, the author is entitled to an effective remedy. The author's conviction must be reviewed in accordance with article 14, paragraph 5, of the Covenant. The State party is under an obligation to take the necessary measures to ensure that similar violations do not occur in future.

10. Considering that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective remedy in the event that a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] Communication No. 701/1996, *Gómez Vásquez v. Spain*, decision of 20 July 2000.

[2] The official text of the reservation reads as follows: "The Spanish Government accedes to the Optional Protocol to the International Covenant on Civil and Political Rights, interpreting article 5, paragraph 2, of the Protocol to mean that the Human Rights Committee shall not consider any communication from an individual unless it has ascertained that the same matter has not been or is not being examined under another procedure of international investigation or settlement."

[3] Communication No. 701/1996, *Gómez Vásquez v. Spain*, decision of 20 July 2000; communication No. 986/2001, *Semey v. Spain*, decision of 30 July 2003; communication No. 1007/2001, *Sineiro Fernández v. Spain*, decision of 7 August 2003; communication No. 1101/2002, *Alba Cabriada v. Spain*, decision of 1 November 2004.

S. Communication No. 1107/2002, *El Ghar v. The Libyan Arab Jamahiriya* (Views adopted on 2 November 2004, eighty-second session)*

Submitted by:	Loubna El Ghar (not represented by counsel)
Alleged victim:	The author
State party:	Socialist People's Libyan Arab Jamahiriya
Date of communication:	14 June 2002 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 2 November 2004,

Having concluded consideration of communication No. 1107/2002 submitted by Loubna El Ghar under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Loubna El Ghar, a Libyan citizen born on 2 September 1981 in Casablanca and residing in Morocco. She claims to be a victim of violations by the Socialist People's Libyan Arab Jamahiriya. She does not refer to any particular provisions of the Covenant, but her allegations would seem to give rise to questions under article 12 thereof. She is not represented by counsel.

1.2 The Covenant and its Optional Protocol entered into force for the Socialist People's Libyan Arab Jamahiriya on 23 March 1976 and 16 August 1989 respectively.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen and Mr. Roman Wieruszewski.

The facts as submitted by the author

2.1 The author, of Libyan nationality, has lived all her life in Morocco with her divorced mother and holds a residence permit for that country. As a student of French law at the Hassan II University faculty of law in Casablanca, she wished to continue her studies in France and to specialize in international law. To that end, she has been applying to the Libyan Consulate in Morocco for a passport since 1998.

2.2 The author claims that all her applications have been denied, without any lawful or legitimate grounds. She notes that although she is an adult, she attached to her application form an authorization from her father, who is resident in the Libyan Arab Jamahiriya, that was certified by the Libyan Ministry of Foreign Affairs in order to obtain any official document required. She adds that in September 2002 the Libyan consul stated, without giving any details, that on the basis of the pertinent regulations he could not issue her a passport, but could only provide her with a temporary travel document allowing her to travel to the Libyan Arab Jamahiriya.

2.3 The author also contacted the French diplomatic mission in Morocco to ascertain whether it would be possible to obtain a laissez-passer for France, a request which the French authorities were unable to comply with.

2.4 Since she had no passport, the author was unable to enrol in the University of Montpellier I in France.

The complaint

3. The author claims that the refusal by the Libyan Consulate in Casablanca to issue her with a passport prevents her from travelling and studying and constitutes a violation of the Covenant.

State party's observations

4.1 In its observations of 15 October 2003, the State party provides the following information. Having been informed of the author's communication, the Passport and Nationality Department contacted the Brotherhood Bureau in Rabat, which indicated that as at 1 September 1999 it had not received any official application for a passport from the author.

4.2 On 6 September 2002, the Passport and Nationality Department asked the Consulate-General to inform it whether the author had submitted an application for a passport, given that it had no record of any information concerning Ms. El Ghar.

4.3 On 13 October 2002, the Passport and Nationality Department sent a telegram to the Consulate-General in Casablanca requesting that the author's application should be forwarded, in the event it had been received, together with all the documents required for the issuing of a passport.

4.4 The State party alleges that it is clear from the foregoing that the Libyan authorities concerned are giving the matter due attention and that the delay is caused by the fact that the author did not go to the Brotherhood Bureau in Morocco at the proper time. The State party points out that there is nothing in the legislation in force to prevent Libyan nationals from obtaining travel documents when they meet the necessary requirements and submit the documents requested.

4.5 Lastly, the State party explains that instructions were sent on 1 July 2003 to the Brotherhood Bureau in Rabat to issue a passport to Ms. Loubna El Ghar. Moreover, the author was contacted at home by telephone and told that she could go to the Libyan Consulate in Casablanca to collect her passport.

Comments of the author on the State party's observations

5.1 In her comments of 24 November 2003 concerning the official date of the submission of her passport application, the author points out that she had initiated procedures as early as 1998, when her mother went to Libya to seek her father's permission to obtain a passport (see paragraph 2.2). She adds that the actual date of her official application for a passport was 25 February 1999.

5.2 With regard to the Passport and Nationality Department and the date of 6 September 2002 mentioned by the State party (see paragraph 4.2), the author recalls that on 18 September 2002, during one of her visits to the Libyan Consulate-General to find out the status of her application, the Libyan officials had indicated that they were unable to give her a passport but would give her a laissez-passer for Libya. The laissez-passer, which was issued that very day and has been submitted by the author, clearly states that "in view of the fact that she is a native of Morocco and has not obtained a passport, this travel document is issued to enable her to return to national territory".

5.3 The author confirms that she received a telephone call on 1 August 2003 from the Libyan Ambassador to the United Nations Office at Geneva informing her that she could go to the Libyan Consulate-General in Casablanca to collect her passport, a communiqué to that effect having been sent by the Passport Department. On the same day the author went to the Consulate with all the documents likely to be needed for the collection of her passport. However, the Libyan officials denied having received the above-mentioned communiqué. Upon her return home, the author called the Libyan Ambassador to the United Nations in Geneva to tell her what had happened, and two days later returned to the Consulate. The author explains that the consul himself told her that there was no need for her to go there each time, and that she would be contacted as soon as the communiqué in question was received. Since then the author has been unable to obtain a passport and thus go abroad to continue her studies.

5.4 The author adds that it is impossible for her to request legal aid with a view to bringing court proceedings against the Libyan authorities from Morocco, and that she cannot lodge an appeal alleging an abuse of authority.

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 As it is obliged to do so pursuant to article 5, paragraph 2 (a), of the Optional Protocol, the Committee ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 Having taken note of the author's arguments concerning the exhaustion of domestic remedies, namely the obstacles standing in the way of any request for legal aid and of an appeal against the decision of the Libyan authorities from Morocco, and given the absence of any relevant objection to the admissibility of the communication by the State party, the Committee considers that the provisions of article 5, paragraph 2 (b), of the Optional Protocol do not preclude it from considering the communication.

6.4 The Committee considers that the author's claim may give rise to issues under article 12, paragraph 2, of the Covenant and therefore proceeds to consider them on the merits, in accordance with article 5, paragraph 2, of the Optional Protocol.

Consideration of the merits

7.1 The Human Rights Committee has considered this communication in the light of all the written information made available to it by the parties, in accordance with article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee notes that to date the author has been unable to obtain a passport from the Libyan consular authorities even though, according to the authorities' own statements, her official application dates back at least to 1 September 1999. Moreover, it is clear that initially, on 18 September 2002, the Libyan consul had indicated to the author that it was not possible to issue her a passport but that she could be given a laissez-passer for Libya, by virtue of a regulation that was explained neither orally nor on the laissez-passer itself. The passport application submitted to the Libyan Consulate was thus rejected without any explanation of the grounds for the decision, the only comment being that since the author "is a native of Morocco and has not obtained a passport, this travel document [laissez-passer] is issued to enable her to return to national territory". The Committee considers that this laissez-passer cannot be considered a satisfactory substitute for a valid Libyan passport that would enable the author to travel abroad.

7.3 The Committee notes that subsequently, on 1 July 2003, the Passport Department sent a communiqué to the Libyan consular authorities in Morocco with a view to granting the author a passport; this information was certified by the State party, which produced a copy of the document. The State party alleges that the author was contacted personally by telephone at home and told to collect her passport from the Libyan Consulate. However, it appears that thus far, despite the author's two visits to the Libyan Consulate, no passport has been issued to her, through no fault of her own. The Committee recalls that a passport provides a national with the means "to leave any country, including his own", as stipulated in article 12, paragraph 2, of the Covenant, and that owing to the very nature of the right in question, in the case of a national residing abroad, article 12, paragraph 2, of the Covenant imposes obligations both on the individual's State of residence and on the State of nationality, and that article 12, paragraph 1, of the Covenant cannot be interpreted as limiting Libya's obligations under article 12, paragraph 2, to nationals living in its territory. The right recognized by article 12, paragraph 2, may, by virtue of paragraph 3 of that article, be subject to restrictions "which are provided by law [and] are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant". Thus there are circumstances in which a State may, if the law so provides, refuse to issue a passport to one of its nationals. In the present case, however, the State party has not put forward any such argument in the information it has submitted to the Committee but has actually assured the Committee that it issued instructions to ensure that the author's passport application was successful, a statement that was not in fact followed up.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 12, paragraph 2, of the Covenant insofar as the author was denied a passport without any valid justification and subjected to an unreasonable delay, and as a result was prevented from travelling abroad to continue her studies.

9. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to ensure that the author has an effective remedy, including compensation. The Committee urges the State party to issue the author with a passport without further delay. The State party is also under an obligation to take effective measures to ensure that similar violations do not recur in future.

10. The Committee recalls that by becoming a State party to the Optional Protocol, the Socialist People's Libyan Arab Jamahiriya has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to ensure an effective and enforceable remedy when a violation has been disclosed. The Committee therefore wishes to receive from the State party, within 90 days following the submission of these Views, information about the measures taken to give effect to them. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

T. Communication No. 1110/2002, *Rolando v. The Philippines* (Views adopted on 3 November 2004, eighty-second session)*

Submitted by:	Pagdayawon Rolando (represented by counsel, Mr. Theodore O. Te, of the Free Legal Assistance Group (FLAG))
Alleged victim:	The author
State party:	The Philippines
Date of initial communication:	22 July 1998 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 3 November 2004,

Having concluded its consideration of communication No. 1110/2002, submitted to the Human Rights Committee on behalf of Mr. Pagdayawon Rolando, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Pagdayawon Rolando, a Filipino national, currently detained at New Bilibid Prisons, Muntinlupa City. He claims to be a victim of violations of article 5, paragraph 2, article 6 paragraphs 1 and 2, article 7, article 9 paragraphs 1, 2, 3 and 4, article 10, paragraph 1, and article 14 paragraphs 1, 2, and 5, of the Covenant. He is represented by counsel. The Optional Protocol entered into force for the State party on 22 November 1989.

1.2 On 28 August 2002, the Human Rights Committee, through its Special Rapporteur on new communications, requested the State party, pursuant to rule 86 of its rules of procedure, not to carry out the death sentence against the author whilst his case was before the Committee.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

The text of two individual opinions signed by Committee members Mr. Martin Scheinin, Ms. Christine Chanet, Mr. Rajsoomer Lallah, Ms. Ruth Wedgwood and Mr. Nisuke Ando.

1.3 On 20 October 2003, following information to the affect that the State party intended to execute the author, the Human Rights Committee, through its Special Rapporteur on new communications, reiterated its request, pursuant to rule 86 of its rules of procedure, not to execute the author whilst his case is before the Committee.

The facts as presented by the author

2.1 In September 1996, the author was arrested and detained at a police station, without a warrant. He was told that he was being detained after allegations made by his wife of the rape of his stepdaughter. Before, the author was employed as a police officer. He requested to see his arrest warrant and a copy of the formal complaint, but did not receive a copy of either. He claims that he was not informed of his right to remain silent or of his right to consult a lawyer, as required under article III, section 12 (1) of the Philippine Constitution of 1987. On 1 November 1996, he was released. Throughout his detention, he was not brought before any judicial authority, nor was he formally charged with an offence.

2.2 On 27 January 1997, he was arrested again and charged with the rape of his stepdaughter Lori Pagdayawon, under article 335, paragraph 3, of the Revised Penal Code, as amended. He claims that he was not informed of his right to remain silent or his right to consult a lawyer. He also claims that the first opportunity he had to engage a private lawyer was at the inquest. The same lawyer represented him throughout the proceedings. On 27 May 1997, the Regional Trial Court of Davao City found him guilty as charged and sentenced him to death, as well as to pay the sum of 50,000 pesos to the victim.[1] According to the author, the death penalty is mandatory for the crime of rape; it is a crime against the person by virtue of Republic Act No. 8353.

2.3 On 15 February 2001, under its automatic review procedure, the Supreme Court affirmed the death sentence of the Trial Court but increased the author's civil liability to 75,000 pesos and "an additional award of 50,000 pesos by way of moral damages".[2] According to the author, the Supreme Court followed its usual practice of not hearing the testimony of any witnesses during the review process, relying solely upon the lower courts' appreciation of the evidence. It reiterated its position, established in previous case law,[3] about the weight given to the testimony of young women who make allegations of rape, by stating that "[t]he testimony of a rape victim, who is young and of tender age, is credible and deserves full credit, especially where the facts point to her having been the victim of a sexual assault. Certainly would not make public the offence and, undergo the trial and humiliation of a public trial if she had not in fact been raped". According to the author, the only effective test which the court has laid down to test the veracity of the alleged victim's allegation is the willingness of the victim to submit herself to a medical examination and endure the ordeal of court proceedings.

2.4 The author describes the procedure set out in paragraph 7 (a) of EP 200, issued by the Bureau of Corrections pursuant to Republic Act 8177, for his execution. It provides that the condemned individual shall only be notified of the execution date at dawn on the date of execution and that the execution must take place within 8 hours of the accused being so informed. No provision is made for notifying the family of the condemned person. The only contact that the accused may have is with a cleric or with his lawyer. Contact can only take place through a mesh screen.

The complaint

3.1 The author claims that his initial detention was illegal and in violation of article 9, paragraphs 1, 2, 3 and 4. He claims that the failure to grant him access to a lawyer during this first period in detention amounts to a violation of article 14, paragraph 1, as it reduced his chances of receiving a fair trial.

3.2 The author claims that the Supreme Court's position, reiterated in the present case, to accept the rape victim's testimony as being true per se, constitutes a violation of the his right to be presumed innocent and equal before the courts, in accordance with article 14, paragraph 2. It also is said to constitute a violation of the equality clause of article 14, paragraph 1, as well as his right to a fair trial. It is submitted that the court's failure to observe the author's right to be presumed innocent and to "effectively reverse the burden of proof in favour of the prosecution" demonstrates a manifest violation of the obligation of impartiality on the part of the judge. He argues that, as the same position was adopted in this case by the Regional Trial Court the presumption of innocence was no longer effective and the author did not receive a fair trial.

3.3 The author adds that the Supreme Court's practice not to hear the testimony of any witnesses during the review process and therefore relying upon the lower courts' appreciation of the evidence, amounts to a failure to undertake a review within the meaning of article 14, paragraph 5, of the Covenant. In this current case one of the author's arguments to the Supreme Court was that the trial court erred in weighting the testimony of Lori Pagdayawon. In his view, in order to have undertaken an adequate review, the Supreme Court should hear the victim to test the veracity of her testimony.

3.4 The author claims that the extension of the death penalty to crimes such as rape by virtue of the 1997 Republic Act No. 8353 violates the State party's obligation to restrict the death penalty to the "most serious crimes", in accordance with article 6. He argues that according to the Economic and Social Council 1984 resolution on the "safeguards guaranteeing the protection of rights and freedoms of those facing the death penalty" adopted in 1984, the phrase "most serious crimes" must be understood as crimes not going beyond intentional crimes with lethal or other extremely grave consequences.[4] The author refers to the growing international consensus against the death penalty and the fact that the statutes of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the International Criminal Court make no provision for the application of the death penalty.

3.5 He claims that if he were to be put to death, the procedure for executions in force in the Philippines, as set out in document EP 200, in which he would only be given a maximum of eight hours notice prior to execution, makes no provision to enable him to say his final farewell to family members, and only provides contact with his lawyer and cleric through a mesh screen, would subject him to inhuman and degrading punishment, and fail to respect the inherent dignity of the human person, guaranteed by articles 7 and 10, paragraph 1, of the Covenant. The author contends that such treatment is psychological/mental torture similar to the "death row phenomenon".

3.6 The author adds that by reintroducing the death penalty for "heinous crimes", as set out in RA 7659, the State party violated article 6 of the Covenant. He argues specifically that paragraphs 1, 2 and 6 of article 6 if read together, support the conclusion that once a State has abolished the death penalty, it is not open to that State to reintroduce it. Further an "extensive interpretation" of article 5, paragraph 2, of the Covenant which would allow a State party to reintroduce the death penalty would run counter to this provision.

Issues and proceedings before the Committee

Consideration of admissibility

4.1 The communication with its accompanying documents was transmitted to the State party on 28 August 2002. The State party did not respond to the Committee's request, under rule 86/91 of the rules of procedure, to submit information and observations in respect of the admissibility and merits of the communication, despite several reminders addressed to it. The Committee recalls that it is implicit in article 4, paragraph 2, of the Optional Protocol that a State party examine in good faith all the allegations brought against it, and that it provide the Committee with all the information at its disposal. In light of the failure of the State party to cooperate with the Committee on the matter before it, due weight must be given to the author's allegations, to the extent that they have been adequately substantiated.

4.2 Before considering the claims contained in the communication, the Human Rights Committee must, in accordance with rule 87 of the rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.3 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the matter is not being examined under another procedure of international investigation or settlement. With respect to the requirement of exhaustion of domestic remedies, the Committee notes that the State party has not claimed that there are any domestic remedies that could be exhausted by the author.

4.4 As to the claim that the author was denied the right to be presumed innocent, in accepting the testimony of the minor victim, the Committee notes that on a review of the judgements of the Regional Trial Court and the Supreme Court, the judiciary did take the minor victim's age into account in assessing her testimony and did consider that a rape trial is of such an ordeal that it would be unlikely to institute such proceedings if a rape in fact had not occurred. However, these were not the only considerations addressed by the Regional Trial Court and the Supreme Court. Both courts took into account, inter alia, medical evidence and witness statements in the evaluation of the facts and evidence in the case. The Committee has also noted the statement, in the judgement of the Regional Trial Court, which confirms that "on the whole, the evidence for the prosecution has overcome the accused's constitutional presumption of innocence. The prosecution has established the guilt of the accused beyond reasonable doubt. The evidence of the accused, consisting merely of denial, did not overcome the probative weight of the prosecution's evidence which established his guilty beyond reasonable doubt." The Committee reiterates its jurisprudence[5] that the evaluation of facts and evidence is best left for the courts of States parties to decide, unless the evaluation of facts and evidence was clearly arbitrary or amounted to a denial of justice. As the author has provided no evidence to demonstrate that the courts' decisions were clearly arbitrary or amounted to a denial of justice, the Committee considers this claim inadmissible under article 2, of the Optional Protocol for non-substantiation for purposes of admissibility. For these reasons, the Committee concludes that this claim is inadmissible.

4.5 As to the author's claim that his rights were violated under article 14, paragraph 5, as the Supreme Court did not hear the testimony of the witnesses but relied on the first instance interpretation of the evidence provided, the Committee recalls its jurisprudence that a "factual retrial" or "hearing de novo" are not necessary for the purposes of article 14, paragraph 5.[6] Accordingly, this part of the communication is therefore inadmissible as incompatible with the provisions of the Covenant, under article 3 of the Optional Protocol.

4.6 The Committee finds the remaining claims raised by the author to be admissible and therefore proceeds to a consideration of the merits of the claims relating to articles 6, 7; 10, paragraph 1; 9 and 14, paragraph 3 (d), of the Covenant.

Consideration of the merits

5.1 The Human Rights Committee has considered the present communication in light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

5.2 The Committee notes from the judgements of both the Regional Trial Court and the Supreme Court, that the author was convicted of statutory rape under article 335 of the Revised Penal Code, as amended by section 11 of Republic Act No. 8353 (see footnote 2 below), which provides that "[t]he death penalty shall be imposed if the crime of rape is committed with any of the following attendant circumstances: 1. When the victim is under eighteen (18) years of age and the offender is a parent, ascendant, step-parent, guardian, relative by consanguinity or affinity within the third civil degree, or the common-law spouse of the parent of the victim ..." Thus, the death penalty was imposed automatically by operation of article 335 of the Revised Penal Code, as amended. The Committee recalls its jurisprudence that the automatic and mandatory imposition of the death penalty constitutes an arbitrary deprivation of life, in violation of article 6, paragraph 1, of the Covenant, in circumstances where the death penalty is imposed without any possibility of taking into account the defendant's personal circumstances or the circumstances of the particular offence.[7] It also notes that rape, under the law of the State party is a broad notion and covers crimes of different degrees of seriousness. It follows that the automatic imposition of the death penalty in the author's case, by virtue of the application of article 335 of the Revised Penal Code, as amended, violated his rights under article 6, paragraph 1, of the Covenant.

5.3 In light of the above finding of a violation of article 6 of the Covenant, the Committee need not address the author's remaining claims under paragraphs 1, 2 and 6 of article 6, which all concern the imposition of capital punishment in this case.

5.4 The Committee notes the author's claims of violations under articles 7 and 10, paragraph 1, on account of the fact that he would not be notified of the date of his execution until dawn of the day in question, whereupon he would be executed within 8 hours and would have insufficient time to bid farewell to family members and organize his personal affairs. It further notes the State party's contention that the death sentence shall be carried out "not earlier than one (1) year nor later than eighteen (18) months after the judgement has become final and executory, without prejudice to the exercise by the President of his executive clemency powers at all times".[8] The Committee understands from the legislation that the author would have at least one year and at most 18 months, after the exhaustion of all available remedies, during which he may make arrangements to see members of his family prior to notification of the date of execution. It also notes that, under section 16 of the Republic Act No. 8177, following notification of execution he would have approximately eight hours to finalize any personal matters and meet with members of his family. The Committee reiterates its prior jurisprudence that the issue of a warrant for execution necessarily causes intense anguish to the individual concerned and is of the view that the State party should attempt to minimise this anguish as far as possible.[9] However, on the basis of the information provided, the Committee cannot find that the setting of the time of the execution of the author within eight hours after notification, considering that he would already have had at least one year following the exhaustion of domestic remedies and prior to notification to organize his personal affairs and meet with family members, would violate his rights under articles 7, and 10, paragraph 1.

5.5 As to the author's claims under article 9, in light of the State party's failure to contest the factual submissions of the author, the Committee concludes that, upon arrest in September 1996, the author was not informed, at the time of arrest, of the reasons for his arrest and was not promptly informed of the charges against him; that the author was arrested without a warrant and hence in violation of applicable domestic law; and that after his arrest, he was not brought promptly before a judge. Consequently, there has been a violation of article 9, paragraphs 1, 2 and 3, of the Covenant.

5.6 As to the author's uncontested claim that he did not have access to a lawyer during his initial period of detention, and that during both periods of detention, he was not informed of his right to legal assistance, the Committee finds a violation of article 14, paragraph 3 (d), of the Covenant.

6. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee reveal a violation by the Philippines of articles 6, paragraphs 1, 9, paragraphs 1, 2 and 3 and 14, paragraph 3 (d) of the International Covenant on Civil and Political Rights.

7. Pursuant to article 2, paragraph 3 (a) of the Covenant, the Committee concludes that the author is entitled to an appropriate remedy including commutation of his death sentence. The State party is under an obligation to avoid similar violations in the future.

8. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The Committee is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] The judgement reads as follows: "The crime committed is statutory rape. The penalty imposable, considering the circumstances of relationship being present, is the supreme penalty of death. The court is left with no alternative but to obey the mandate of the law in the imposition of the penalty. In the language of the Supreme Court in *People v. Leo Echegaray, G.R.* No. 117472, June 25, 1996, 'The law has made it inevitable under the circumstances of this case that the accused-appellant face the supreme penalty of death.'"

[2] The Supreme Court stated that the author was sentenced under section 11 of Republic Act No. 7659, which states inter alia that "The death penalty shall also be imposed if the crime of rape is committed with any of the following attendant circumstances: 1. When the victim is under eighteen (18) years of age and the offender is a parent, ascendant, step parent, guardian, relative by consanguinity or affinity with the third civil degree, or the common-law spouse of the parent of the victim …". The court stated that "The qualifying circumstances of minority and relationship that would warrant imposition of the death penalty were specifically alleged and proven."

[3] *People v. Tao*, G.R. No. 133872, 5 May 2000; *People v. Amigable*, G. R No. 133857, 31 March 2000; *People v. Sampior*, G. R No. 117691, 1 March 2000.

[4] Resolution 39/118 of 14 December 1984.

[5] *Ramil Rayos v. The Philippines*, case No. 1167/2003, Views of 27 July 2004.

[6] *Perera v. Australia*, case No. 536/93, and *H.T.B. v. Canada*, case No. 534/1993.

[7] *Thompson v. St. Vincent & The Grenadines*, case No. 806/1998, Views of 18 October 2000; and *Kennedy v. Trinidad & Tobago*, case No. 845/1998, Views of 26 March 2002, *Carpo v. The Philippines*, case No. 1077/2002, Views of 6 May 2002.

[8] Section 1, Republic Act No. 8177.

[9] *Pratt and Morgan v. Jamaica*, case No. 210/1986 and 225/1987, Views adopted on 6 April 1989.

Individual opinion of Committee members Mr. Martin Scheinin, Ms. Christine Chanet and Mr. Rajsoomer Lallah

(partly dissenting)

We are in full support of the Committee's finding of a violation of article 6, paragraph 1, of the Covenant, due to categorization of the author's mandatory death penalty as arbitrary deprivation of life. In this respect, the case affirms and builds upon the Committee's earlier case law, as established in *Thompson v. St. Vincent and the Grenadines* (communication No. 806/1998), *Kennedy v. Trinidad and Tobago* (communication No. 845/1998), *Carpo et al. v. The Philippines* (communication No. 1077/2002) and *Ramil Rayos v. The Philippines* (communication No. 1167/2003).

However, we dissent in respect of paragraph 5.3 of the Views where the Committee concluded that it need not address the author's other claims related to article 6. Although the majority also here follows the Committee's earlier Views in *Carpo*, decided on 28 March 2003, we are of the opinion that the time has come to address the question of the compatibility with article 6 of the reintroduction of capital punishment in a country that once abolished it. Since the decision in *Carpo* - in which we participated - two important developments have taken place, on the basis of which the issue now is in our view ripe for assessment by the Committee.

Firstly, in October 2003 the Committee considered the second periodic report by the Philippines, in which context the issue of capital punishment was addressed from various perspectives and the Committee's understanding of the law and practice of the State party was greatly enhanced (see, the State party report CCPR/C/PHL/2002/2, the Committee's summary records CCPR/C/SR.2138, 2139 and 2140, and the Committee's concluding observations CCPR/CO/79/PHL).

Secondly, already in the next session after the disposal of the *Carpo* case, the Committee addressed the compatibility with article 6 of the reintroduction of capital punishment, once abolished. This was done in the case of *Roger Judge v. Canada* (communication No. 829/1998), decided on 5 August 2003, where the Committee held that Canada, despite having abolished capital punishment, violated article 6 by deporting the author of the communication to another country where he would face the risk of the death penalty. It is to be pointed out that the finding was not made on the basis that Canada was a party to the Second Optional Protocol, which it is not, nor on the basis that the author would risk a violation of article 6 in the receiving country. The issue was whether exposing a person to the risk of facing capital punishment in another country was *per se* in violation of article 6 when done by an abolitionist country.

The answer given by the Committee was affirmative:

> "10.4 In reviewing its application of article 6, the Committee notes that, as required by the Vienna Convention on the Law of Treaties, a treaty should be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Paragraph 1 of article 6, which states that 'Every human being has the inherent right to life ...', is a general rule: its purpose is to protect life. States parties that have abolished the death penalty have an obligation under this paragraph to so protect life in all circumstances. Paragraphs 2 to 6 of article 6 are evidently included to avoid a reading of the first paragraph of article 6, according to which that paragraph could be understood as abolishing the death penalty

as such. This construction of the article is reinforced by the opening words of paragraph 2 ('In countries which have not abolished the death penalty ...') and by paragraph 6 ('Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State party to the present Covenant.'). In effect, paragraphs 2 to 6 have the dual function of creating an exception to the right to life in respect of the death penalty and laying down limits on the scope of that exception. Only the death penalty pronounced when certain elements are present can benefit from the exception. Among these limitations are that found in the opening words of paragraph 2, namely, that only States parties that 'have not abolished the death penalty' can avail themselves of the exceptions created in paragraphs 2 to 6. *For countries that have abolished the death penalty, there is an obligation not to expose a person to the real risk of its application.* Thus, they may not remove, either by deportation or extradition, individuals from their jurisdiction if it may be reasonably anticipated that they will be sentenced to death, without ensuring that the death sentence would not be carried out." (emphasis added)

To any reader familiar with the issue of capital punishment, it is clear that the Committee in the quoted paragraph decided not only its position in respect of "indirect" reintroduction of capital punishment, where an abolitionist country sending someone to face the death penalty in another country, but also what comes to direct reintroduction by allowing in its own law for the death penalty after first abolishing it.

Hence, the legal issue of whether reintroduction of capital punishment after once abolishing it is in breach of article 6 has been clarified after the adoption of the Committee's Views in *Carpo*. What remains undecided is the factual issue whether the constitutional and legislative changes made in the Philippines in 1987 amounted to the abolition of capital punishment. This is the issue that could - and in our view should - have now been addressed by the Committee. The majority of Committee members considered that there was no need to address the issue in the current case, without discussing its merits.

The Covenant entered into force in respect of the Philippines on 23 January 1987 without any reservations. From that date onwards it was bound by the full spectrum of obligations that stem from article 6 of the Covenant. Immediately on 2 February 1987, a new Constitution took effect following approval by the people consulted by plebiscite. That Constitution, in article 3 (19) (1), removed the death penalty from the applicable law of the land in the following terms:

> "Executive fines shall not be imposed, nor cruel, degrading or inhuman punishment inflicted. Neither shall the death penalty be imposed, unless for compelling reasons involving heinous crimes, the Congress hereafter provides for it. Any death penalty already imposed shall be reduced to reclusion perpetua."

From 1987 to 1993, the legal order of the Philippines did not include a possibility to sentence a person to death, or even the institution of capital punishment. Hence, the situation was different from a mere moratorium where capital punishment remains in the law in books but its application is suspended in practice. On 13 December 1993, the Philippine Congress, by way of Republic Act No. 7659, adopted new legislation that again included the death penalty for a number of crimes. As is clear from the above-quoted provision of the Constitution, capital punishment could be brought back to application only through new legislative decision.

Such decision was taken in 1993, and although the constitutionality of the measure was contested, it was, for the purposes of domestic constitutional law, as distinct from compliance with the Covenant, upheld by the Supreme Court in the case of *People v. Echegaray* (GR No. 117472, judgement of 7 February 1997). In this ruling the Supreme Court, by a majority, held that new laws authorizing capital punishment were not unconstitutional. A part of the majority's reasoning was:

> "Article III, section 19 (1) of the 1987 Constitution plainly vests in Congress the power to reimpose the death penalty 'for compelling reasons involving heinous crimes'. This power is not subsumed in the plenary legislative power of Congress, for it is subject to a clear showing of 'compelling reasons involving heinous crimes.' The constitutional exercise of this limited power to reimpose the death penalty entails (1) that Congress define or describe what is meant by heinous crimes; (2) that Congress specify and penalize by death, only crimes that qualify as heinous in accordance with the definition or description set in the death penalty bill and/or designate crimes punishable by reclusion perpetua to death in which latter case, death can only be imposed upon the attendance of circumstances duly proven in court that characterize the crime to be heinous in accordance with the definition or description set in the death penalty bill; and (3) that Congress, in enacting this death penalty bill be singularly motivated by 'compelling reasons involving heinous crimes.'"

What is clear to us on the basis of this and other passages of the ruling is that the Supreme Court's assessment was limited to the domestic constitutional issue and did not extend to the question whether the enactment of the 1987 Constitution amounted to an abolition in the meaning of article 6, paragraph 2, of the Covenant, and what would be the consequences under the Covenant if it did. Nevertheless, we find it proper to quote also a particularly articulate minority opinion, also written in the framework of domestic constitutional law rather than international law:

> "... the Constitution did not merely suspend the imposition of the death penalty, but in fact completely abolished it from the statute books. The automatic commutation or reduction to reclusion perpetua of any death penalty extant as of the effectivity of the Constitution clearly recognizes that, while the conviction of an accused for a capital crime remains, death as penalty ceased to exist in our penal laws and thus may no longer be carried out. This is the clear intent of the framers of our Constitution."

In the above description of the sequence of events we have avoided expressing a position as to whether what happened in the Philippines in 1987 amounted to an abolition of the death penalty in the sense of article 6, paragraph 2, of the Covenant. It is now time to answer that question.

As the Committee notes in paragraph 4.1 of its Views in the current case, the Philippines has not furnished the Committee with any submissions in response to the communication. This is of course regrettable but cannot prevent the Committee from establishing the facts in the light of the material it has in its possession.

In our view the distinction between abolition and a moratorium is decisive. In 1987 the Philippines removed capital punishment from it legal order, so that no provision of criminal law included a possibility to sentence any person to death. The death penalty could not be applied on the basis of the reference to it in the Constitution. On the contrary, the Constitution itself made it very clear that capital punishment had been removed from the legal order, i.e., abolished. The fact that the Constitution came to include a kind of domestic reservation, meaning that not every form of reintroducing capital punishment would be unconstitutional, has no relevance for the substantive contents or application of article 6 of the Covenant as an international treaty.

Hence, our conclusion is that, for purposes of article 6, paragraph 2, of the Covenant, the Philippines abolished capital punishment in 1987 and reintroduced it in 1993. Subsequent to that, the author of the current communication was sentenced to death. This constituted, in our view, a violation of article 6 of the Covenant. This violation is separate from and additional to the violation of article 6 established by the Committee on the basis of the mandatory nature of the death sentence.

Our conclusion is supported by the State party's own arguments submitted to the Committee in the earlier *Carpo* case. Although the State party failed to cooperate with the Committee in the current case, it is of relevance now that before the Committee's disposition of *Carpo*, the State party argued as follows:

> (1) "That the Philippines, under the 1987 Constitution, had decided to abolish it [the death penalty] did not disable its legislature from again imposing such a penalty for the Constitution itself allows for its imposition."
>
> (2) "... the constitutionality of the death penalty law is a matter for the State party to decide. The Committee is not empowered to interpret the constitution of a State party for purposes of determining whether such State party is complying with its obligations under the Covenants."
>
> (3) Article 6, paragraph 2, of the Covenant 'does not refer to countries that have once abolished the death penalty: it simply refers to countries that have existing death penalty statutes."

Statement (1) is correct as a matter of Filipino constitutional law but at the same time amounts to an admission that the sequence of events should be categorised as abolition followed by reintroduction. Statement (2) is technically correct but does not affect the Committee's competence to interpret article 6 of the Covenant. Statement (3) is manifestly incorrect in the light of the opening words of article 6, paragraph 2: "In countries that which have not abolished the death penalty, sentence of death may be imposed ... ."

Over the more than 25 years of its existence, the Human Rights Committee has developed singularly important jurisprudence on the issue of the right to life and its effect of narrowing down any application of capital punishment. Although it is clear that the drafters of the Covenant could not reach agreement about outlawing capital punishment, they nevertheless included in the detailed provisions of article 6 a number of restrictions on the application of this ultimate punishment which many states, supreme or constitutional courts in various parts of the world, eminent jurists, academics and members of the general public regard as inhuman. Through a rigorous application of the various elements of article 6 the Committee has in its jurisprudence managed to develop international scrutiny over the application of the death penalty without, however, reading a total ban against it into article 6. Some of the most important dimensions of this voluminous jurisprudence relate to the effect of a violation of the right to a fair trial in proceedings leading to capital punishment constituting not only a violation of article 14 but also of article 6, to the categorization of mandatory death penalty for a broadly defined crime as arbitrary deprivation of life, to the scope of the notion of "most serious crimes" in paragraph 2 of article 6 and, in *Judge*, to the issue of indirect reintroduction of capital punishment through an abolitionist country deporting a person to face a risk of it elsewhere, as violations of article 6. Furthermore, with reference to article 7 of the Covenant, the Committee has also decided that certain forms of execution, as well as prolonged stay on death row if accompanied by "further compelling circumstances", constitute violations of the Covenant. All this jurisprudence has, together with the exclusion of certain categories of persons from capital punishment in the text of article 6, in effect narrowed down any use of capital punishment. It may well be that one day the Committee will find sufficient grounds to conclude that in the light of evolving public opinion, state practice and case law from various jurisdictions, any form of execution constitutes an inhuman punishment in the meaning of article 7.

Future cases will show whether this will indeed be the line of further evolution in the Committee's jurisprudence. Be it as it may, in our view the Committee should in the current case have followed its interpretation already expressed in *Judge* and addressed the question whether the Philippines violated article 6 by reintroducing capital punishment in 1993, after abolishing it in 1987. As explained above, our answer is affirmative.

(*Signed*): Martin Scheinin

(*Signed*): Christine Chanet

(*Signed*): Rajsoomer Lallah

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Individual opinion of Committee members Ms. Ruth Wedgwood and Mr. Nisuke Ando

Consistent with our separate opinions in *Carpo v. The Philippines*, case No. 1077/20002, 6 May 2002, we are unable to join in paragraph 5.2 of the Committee's Views. In addition, we do not agree with the dissenting views of Mr. Scheinin, Ms. Chanet, and Mr. Lallah in this case. The Committee has never suggested, and does not suggest in this case, that a state party should be thwarted in its reform of penalty provisions by an expansionist reading of article 6 (2) of the Covenant. The State party here has amended its national constitution to limit the death penalty to "heinous offences" and has accordingly rewritten its criminal statutes. This was a good-faith attempt to abide by the Covenant obligation to use the death penalty "only for the most serious crimes". Protocol II of the Covenant provides a separate modality for those States willing to abolish the death penalty in all cases. It would only discourage amelioration of penalty provisions to suggest that even a temporary suspension during a period of legislative reform should prohibit a narrowed application of the death penalty. Such a reading is not supported by the language or *travaux preparatoires* of article 6 (2), and would defeat the very ends its proponents seek.

(*Signed*): Ruth Wedgwood

(*Signed*): Nisuke Ando

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

7.3 The complaint before the Committee also refers to violations that allegedly occurred after the above-mentioned dates. The Committee considers that with regard to the incidents the author complains of that occurred after 6 October 1995, the communication raises issues that are different from those raised before the European Commission of Human Rights and therefore should be examined to determine their admissibility.

7.4 The Committee takes note of the State party's observations that on various occasions the prison authorities revised the prison regime applicable to the author and that, although they tried to place him under a more flexible regime, his aggressive behaviour and the frequent incidents and fights with other prisoners and prison officials compelled them to place him back under the regime reserved for dangerous prisoners. As a consequence of these incidents the author was on several occasions subjected to disciplinary measures. The Committee further notes the medical certificates supplied by the author indicating the existence of injuries. These certificates, dating from September 1998 to February 2001, when the author was being held at the Madrid II penitentiary, refer to incidents that allegedly occurred subsequent to the submission of the initial communication. The author states that he complained of these incidents to the judicial authorities, but there is no indication in the file that the author appealed the decisions handed down by the lower courts. There is also no indication that the author appealed the judicial decisions handed down regarding the complaints he filed on 13 March 1997, 1 October 1997 and 26 January 1998. That part of the communication must therefore be considered inadmissible according to article 5, paragraph 2 (b), of the Optional Protocol.

7.5 The Committee observes that on 2 October 1996 the author filed a complaint against the authorities of the Villanubla penitentiary, Valladolid, regarding his prison regime, in which he mentioned the ill-treatment to which he was subjected under that regime. When his complaint was rejected at the lower court and appeal levels, the author filed an application for *amparo* with the Constitutional Court. The Committee considers that, in relation to those incidents, the author did exhaust all domestic remedies. However, the Committee considers that the author's complaints were not sufficiently substantiated to be able to conclude that he was subjected to treatment that was in violation of articles 7 and 10 of the Covenant, which therefore leads it to consider the communication inadmissible under article 2 of the Optional Protocol.

8. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 2 and article 5, paragraph 2 (b), of the Optional Protocol;

(b) That this decision shall be communicated to the State party and the author of the communication.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] According to the file, the author was serving sentences for several offences of robbery with intimidation and a riot in 1981 in the Pontevedra prison.

[2] FIES: *Fichero de Internos de Especial Seguimiento.* In an internal judicial decision cited by the author there is a reference to the fact that the FIES roster is simply a database that records criminal, court and prison status of certain prisoners without dictating a way of life for the inmate, and that the prison regime for the treatment of extremely dangerous prisoners is governed by article 10 of the Act organizing the Penitentiary System, which provides for the possibility of an isolation regime.

[3] At that time the author was serving a sentence at the Soto del Real penitentiary, Madrid province.

[4] The main subject of the application, according to the document that appears in the file, was the author's classification in the FIES regime. The author does mention in that document that he was subjected to constant degrading treatment, routine strip-searches and physical ill-treatment, but he does not describe any particular incident.

[5] The author provides no information on the outcome of these two complaints.

[6] There is no information in the file about the consequences of this decision or the reasons why the author appealed it.

[7] Seven of these reports emanate from Alcalá de Henares examining court No. 2 (Madrid province), one from examining court No. 3 and one from court No. 7 of the same city, and two from Madrid prison supervision court No. 1. The other two do not clearly show which court they pertain to.

[8] Under this regime, the author can go out into the yard for two hours in the morning and two hours in the afternoon, where he can participate in sports and be in company with any other inmate in this block. He can read and study and has access in his cell to television, books, magazines and music.

C. Communication No. 918/2000, *Vedeneyev v. The Russian Federation* (Decision adopted on 29 March 2005, eighty-third session)*

Submitted by:	Galina Vedeneyeva (represented by Alexander Manov, Director of the International Protection Centre in Moscow)
Alleged victim:	Konstantin Vedeneyev (the author's son)
State party:	Russian Federation
Date of communication:	24 February 1997 (initial submission)
Subject matter:	Torture to obtain a confession, prison conditions, death from tuberculosis in detention
Substantive issues:	Failure to exhaust domestic remedies; burden of proof
Articles of the Covenant:	6 (1), 7 and 10 (1)
Articles of the Protocol:	5 (2) (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 29 March 2005,

Adopts the following:

Decision on admissibility

1.1 The author of the communication is Galina Maksimova Vedeneyeva, a Russian citizen. She claims that her son, Konstantin Vedeneyev, a Russian citizen born in 1966, deceased, is a victim of a violation by the Russian Federation of articles 6 (1), 7 and 10 (1) of the Covenant. She is represented by Karina Moskalenko, Director of the International Protection Centre in Moscow.

1.2 The Optional Protocol entered into force for the Russian Federation on 1 January 1992.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen and Mr. Roman Wieruszewski.

Factual background

2.1 The author states that on 20 April 1994, Konstantin Vedeneyev was arrested in Tomsk on suspicion of having committed a murder in Moscow. He was transferred to Moscow and taken to Pretrial Detention Centre No. 1, and on an unspecified subsequent date to Moscow Pretrial Detention Centre No. 2, for interrogation. Vedeneyev initially protested his innocence, but allegedly was tortured by police officers to extract a confession from him. The author received letters from her son which described the treatment he suffered, which included being beaten and subjected to electric shocks. As a result of this treatment, Vedeneyev eventually provided a false confession to the murder in question, which he later retracted. He saw a lawyer for the first time on 6 May 1994. The investigation into the case concluded on 20 December 1994, and the case was due to be heard in early 1995.

2.2 The author states that her son's letters described the unacceptable conditions in which he was held at Moscow Pretrial Detention Centre No. 2. He was kept in an overcrowded cell with 100 other inmates, had no bed to sleep on, and received inadequate food. Vedeneyev contracted tuberculosis but received no proper medical treatment. His condition worsened, and on 26 January 1995, Vedeneyev was transferred to Pretrial Detention Centre No. 1 for medical treatment, where he died on 28 January 1995. The cause of death recorded on his death certificate was tuberculosis of the lungs. The author states that her son had been a strong and healthy man when he was taken into custody.

2.3 On an unspecified date, the author filed a complaint with the Moscow City Procurator, in which she stated that her son had been tortured to extract a confession; that he was not provided with access to legal counsel until over two weeks after his arrest; and that he was kept in terrible conditions at Moscow Pretrial Detention No. 2, where he contracted tuberculosis. She stated that keeping her son under such conditions amounted to an extrajudicial death sentence, and requested that those responsible for her son's death be brought to justice.

2.4 By letter dated 21 March 1996, the director of Pretrial Detention Centre No. 2 informed the author that he had received her complaint from the Moscow City Procurator, and that the circumstances of her son's death had been investigated. He stated that no violations of rules relating to conditions of detention or the provision of medical assistance to detainees had been identified. According to the letter, Vedeneyev had been diagnosed with acute tuberculosis on 17 November 1994, for which he received appropriate medical treatment; on 20 January 1995, his condition worsened, resulting in him being hospitalized; he was further diagnosed with a severe pneumonia. He was finally taken to a surgery department at Moscow Pretrial Detention Centre No. 1 on 26 January 1995, but efforts to save his life were unsuccessful.

2.5 The author states that she filed appeals with the regional, municipal and general procurators, but does not provide any details about these appeals, other than to state that they were unsuccessful.

The complaint

3. The author states that her son was subjected to torture and cruel, inhuman and degrading treatment, in violation of his rights under article 7 of the Covenant. She contends that the conditions in Moscow Pretrial Detention Centre No. 2 were such that her son was not treated

with humanity and respect for his dignity during his detention at that facility, in violation of article 10 (1); and that her son's death from tuberculosis in these circumstances amounted to a violation of his right to life under article 6 (1) of the Covenant.

State party's submission and author's comments

4. In its submission of 10 December 2001, the State party contends that the communication is inadmissible because the author failed to exhaust domestic remedies, as she did not appeal to the General Procurator of the Russian Federation, nor to the Supreme Court.

5. In a submission dated 22 August 2004, the author states that she does not consider the Procurator General of the Russian Federation or the Supreme Court to be bodies capable of providing effective remedies. She does not provide any explanation for this submission.

6. In a further submission dated 7 February 2005, the State party provides further information on the appeal processes which it says were available to the author, but were not exhausted. It states that all decisions of organs of state power are subject to appeal, as guaranteed by article 46 of the Russian Constitution. Under Russian law, representatives of a victim are able to file an appeal on his or her behalf. The grounds for changing a decision at first instance include the decision's non-compliance with legal provisions, unjustness, or disparity between the conclusions drawn at first instance and the relevant facts. The Law on the procurator provides that any complaints about unlawful actions are reviewable by the procuracy, and that a complaint to the procuracy does not preclude a person from filing a complaint directly in a Court. The State party reiterates its view that the communication is inadmissible for non-exhaustion of domestic remedies.

Issues and proceedings before the Committee

7.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

7.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a), of the Optional Protocol.

7.3 The Committee has noted the State party's submission that the author did not exhaust available domestic remedies, as she did not take her complaints about the alleged mistreatment of her son to the General Procurator of the Russian Federation and subsequently to the Supreme Court. Whilst the author contends that these bodies would not provide an effective remedy in the present case, no explanation has been provided by her in support of this contention. The Committee considers that, whilst the author of a communication does not bear the sole burden of proof for a contention that a particular domestic remedy is ineffective, an author must at least present a prima facie argument in support of such a proposition, and substantiate his or her reasons for believing that the remedy in question is or would be ineffective. In the present case, the author has not done this.

8. Accordingly, the Committee decides that:

(a) The communication is inadmissible under article 5, paragraph 2 (b) of the Optional Protocol;

(b) This decision shall be communicated to the State party and the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

D. Communication No. 939/2000, *Dupuy v. Canada*
(Decision adopted on 18 March 2005, eighty-third session)[*]

Submitted by:	Georges Dupuy (not represented by counsel)
Alleged victim:	The author
State party:	Canada
Date of communication:	4 November 1998 (initial submission)
Subject matter:	Failure to disclose a document during criminal proceedings
Procedural issues:	Exhaustion of domestic remedies; substantiation of the complaint
Substantive issues:	Right to a fair trial; rights in the preparation of the defence; right to be tried without undue delay
Articles of the Covenant:	2 (3), 3, 14 (3) (b) and 26
Articles of the Optional Protocol:	2 and 5 (2)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 18 March 2005,

Adopts the following:

Decision on admissibility

1. The author of the communication is Mr. Georges Dupuy, a Canadian citizen, born on 9 May 1947. The author claims to be the victim of violations by Canada of article 2, paragraph 3, article 3, article 14, paragraph 3 (b), and article 26 of the International Covenant on Civil and Political Rights. The author is not represented by counsel.

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[*] The following members of the Committee participated in the examination of the present communication: Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Factual background

2.1 On 16 August 1991, Ms. Gascon, the author's then wife, lodged a complaint against the author for allegedly making death threats against her.

2.2 Following a preliminary investigation on 19 December 1991, the Criminal Court of Quebec convicted the author on 24 April 1992 of having deliberately threatened, by telephone on or about 12 and 15 August 1991, to kill or seriously hurt Ms. Gascon. On 12 March 1993, the judge handed down a suspended sentence of two years with probation.

2.3 On 15 February 1994, the Quebec Court of Appeal refused to alter the verdict and on 11 August 1994 the Canadian Supreme Court rejected the author's application for leave to appeal. The author specifies that the decisions of the courts were based on the sole testimonies of Ms. Gascon and himself.

2.4 The author says that it was only in December 1994 that he saw a police report containing a written statement about him by Ms. Gascon dated 16 August 1991.

2.5 On 3 April 1995, under section 690 of the Criminal Code, the author requested the Minister of Justice to order a new trial on grounds of the non-disclosure of the above-mentioned statement during the trial.

2.6 On 14 December 1995, the author sued the Government of Quebec for what he alleged was the malicious conduct of the deputy Crown prosecutor handling the case for failing to submit the written statement of 16 August 1991 during the trial.

2.7 On 20 March 1996, the Superior Court of the district of Montreal allowed the deputy prosecutor's motion for dismissal and rejected the author's appeal. On 17 June 1997, the Court of Appeal held that certain allegations in the complaint of 14 December 1995 might warrant the reopening of the trial; it quashed the judgement of the trial court and ruled that the outcome of the present appeal depended initially on the decision the Minister of Justice would take on the author's application under section 690 of the Criminal Code and subsequently on the outcome of any new trial ordered by the Minister.

2.8 On 7 May 2001, the Minister of Justice rejected the author's application for a retrial.

The complaint

3.1 The author declares that he is innocent and that he was, in fact, sentenced on the basis of false accusations by Ms. Gascon so that she could obtain possession of the family home when the couple separated.

3.2 The author maintains that Ms. Gascon's written statement was deliberately and maliciously withheld from him during the trial in order to weaken his defence. The author considers that this statement constituted new evidence which would have enabled him to contest the complainant's version. The author thus asserts that he is the victim of a miscarriage of justice. He also emphasizes the delay in the decision of the Minister of Justice under section 690 of the Criminal Code.

3.3 The author explains that his case is the result of the Quebec Government's sexist policy of punishing men in matters of conjugal violence for the benefit of extremist feminist groups, thereby undermining the equality of marriage partners.

3.4 The author complains that because he has a criminal record it is difficult for him to find a job. He says that domestic remedies have been exhausted, as described above.

The State party's submission on admissibility and merits

4.1 In its submissions of 21 June 2002, the State party's principal assertion is that the communication is inadmissible. Firstly, it maintains that domestic remedies have not been exhausted with regard to the complaint of a violation of article 14, paragraph 3 (b). According to the State party, a decision under section 690 of the Criminal Code may be the subject of an application for judicial review before the Federal Court of Canada under article 18.1 of the Federal Courts Act. The Court may therefore strike down a decision and return the case to the judge for a new decision. The State party specifies that the Federal Court had in fact had to handle an application for judicial review following a refusal for a new trial in the case of an applicant who alleged that a document - the victim's medical report in this case - had not been made available to the accused before or during the trial. The Court refused to intervene, however, on the grounds that it had been established that the accused had known of the document's existence even before the trial started. The Federal Courts Act provides for a period of 30 days to submit an application for judicial review. The Court may, on request, extend this period. The decision of the Trial Division of the Federal Court may be appealed against before the Federal Court of Appeal. The latter decision may also be appealed against before the Supreme Court of Canada subject to the latter's granting of leave to appeal. The State party considers that the author of the present communication cannot be excused for not having exhausted domestic remedies because he did not observe the prescribed deadlines.

4.2 Secondly, the State party maintains that there was no prima facie violation of article 14 of the Covenant. It considers that the author is actually requesting the Committee to re-evaluate the Canadian courts' findings of fact and credibility. The State party recalls the Committee's jurisprudence according to which it is not for the Committee to question the assessment of the evidence by the domestic courts unless this assessment amounted to a denial of justice. According to the State party, the author has not established that justice was denied in the case in question, since his conviction is based on his testimony and the Court's assessment of it. The Court of Appeal of Quebec rejected the appeal against the conviction and the Supreme Court of Canada refused the application for leave to appeal against this decision. The State party stresses in this instance the importance of the doctrine of *res judicata*. The author furthermore took advantage of the application for mercy under section 690 of the Criminal Code after exhausting the rights of appeal and alleged that the trial was not fair, particularly in respect of article 14, paragraph 3 (b). According to the State party, the author cites the same grounds to the Committee as those put forward in support of his application for mercy, namely, that Ms. Gascon's statement should have been disclosed to him during the trial. The State party maintains that the approach to follow in the present case should be based on the *Stinchcombe* decision, in which the Supreme Court of Canada stated that in the event of a failure to disclose information, it had to be ascertained whether disclosing the information might have affected the outcome of the proceedings. In this connection, the State party also mentions the jurisprudence of the European Court of Human Rights and Canada.

4.3 The State party explains that the disclosure of the victim's statement to the author would not have influenced the result of the trial and that he did receive a fair trial. The State party specifies that a criminal conviction in Canada for threatening to kill or inflict serious injury is based on evidence beyond reasonable doubt brought by the deputy Crown prosecutor that threats were made (*actus reus*) and that the accused made these threats intentionally (*mens rea*). The State party recalls that the author was well aware of the facts that gave rise to the charges against him at his trial on 24 April 1992 since on 19 December 1991 Ms. Gascon had testified and had been cross-examined on them during the preliminary investigation. The author had moreover admitted that he had made the two telephone calls to Ms. Gascon in which threats were allegedly made and that the words he had used might have been interpreted by Ms. Gascon as threats.

4.4 Although he denied making threats, the author admitted that he said the following during his telephone conversation with Ms. Gascon on 12 August 1991:

> "That's why I called her again on the 12th, I mean, it was to tell her she had been violent when she was in the car with me. I mentioned her screams and her attitude. Then I said … I told her that there could be a fatal accident if it happened again, that sort of situation. … Perhaps she interpreted what I said as death threats, it's quite possible, I don't know. … Question by the Court: So you're telling us that what you said to her was that if ever she did that again, you might lose patience, you might grab the brake … Reply: Right. Question: … and that that could be fatal? Reply: Yes, it could cause an accident. Question: For whom? For whom? Reply: Well, both of us or … well, if there's a car accident, you don't know what might happen; I could die in the accident, or perhaps both of us …" (Annex B, transcript of the proceedings, testimony of Mr. Dupuy, pp. 34 and 35).

4.5 According to the State party, the Court considered that these words, indicating an intention to take action while Ms. Gascon was driving, constituted a threat and that he had said them intentionally. It was not necessary for the author to have intended to put his threats into effect and kill Ms. Gascon to establish that the offence had been committed.

4.6 With regard to the second threat to kill or injure her, which was made, according to the State party, during the telephone call of 15 August 1991, the author said that he did not recollect saying the words attributed to him by Ms. Gascon, that is, that when he left the hospital he was going to kill her. He said, however, that he thought he had said things that she had perhaps misinterpreted as threats. As the Court stressed in its judgement, the author hesitated for a long time before denying that he had made the remarks recounted by Ms. Gascon.

4.7 The State party maintains that the author's conviction is based first and foremost on the assessment of his credibility and the statements he made to the Court. The Court found that he had deliberately threatened Ms Gascon with serious injury or even death even if he had not had any intention of carrying out the threats. According to the State party, since the two elements of the offence - the intention to cause fear by intimidating language and the act of uttering such words - have been established, the reason for making the threats is not relevant. The State party maintains that Ms. Gascon's statement conveys no new or pertinent information on the elements of the crime and would not have had the impact the author claims. Moreover, according to the State party, the author claims that he would only have used the statement to cross-examine

Ms. Gascon on two points, namely the motive for the crime and the month in which the events leading to the accusations took place, so as to undermine Ms. Gascon's credibility and thus obtain a different verdict.

4.8 The State party maintains that this cross-examination would not have had any effect. The author basically alleges that Ms. Gascon said in her written statement that the motive for the crime was that she wanted to put an end to their relationship, but the author contests this and claims rather that she wanted to obtain ownership of their joint residence. The State party considers that the author appears to be confusing "motive for the crime" he is accused of committing and "motive for filing the complaint", in other words, Ms. Gascon's reasons for filing a complaint. According to the State party, even if it had been established that Ms. Gascon's desire to acquire ownership of the joint residence had been the reason for filing the complaint, this issue is completely separate from the concept of the "motive for the crime" and is not relevant to the author's being found guilty of deliberately making threats. Furthermore, the State party explains that, contrary to the author's allegations before the Committee, the "motive" for the offence is not relevant in terms of the intention required for a finding of guilt. Consequently, even if the victim's assessment of the facts did not prove correct, the "motive for the crime" is not an element of the offence in question and is of no relevance.

4.9 According to the State party, the author could not be unaware of the connection Ms. Gascon made between the separation she had announced and his threats against her. He had been informed of this during Ms. Gascon's testimony in the preliminary investigation. Furthermore, Ms. Gascon's testimony during the trial began with a reminder that she had announced her intention of leaving him at the end of June 1991 and she stated, during cross-examination, that it was on 12 August, when he first threatened her, that the author reproached her for this decision. According to the State party, the author's counsel endeavoured to establish from the start of the cross-examination that the spouses had had a dispute over the sale of the house, but Ms. Gascon replied that that was not the case since it had been mutually agreed to wait until the author was in better health before proceeding with the sale. The author's counsel therefore cross-examined Ms. Gascon, in Mr. Dupuy's words, on the "motive for the crime". During cross-examination at the trial, Ms. Gascon repeated her statement and the testimony she had given during the preliminary investigation concerning the dispute with the author. Since she was giving her interpretation of the facts and since the versions she gave did not differ, the State party considers that the cross-examination on this point could not possibly reveal any contradiction or incompatibility that might cast doubt on her credibility. Furthermore, during the author's testimony at the trial, he gave his version of the events that had preceded and given rise to the telephone calls, which he admitted making. According to the State party, the Court had not held against him the fact that he did not accept the break-up since it was not an element of the offence, contrary to the author's claim. In any case, the Court was able to assess the testimonies of the author and the victim with regard to the events that had preceded and given rise to the telephone calls in question and was in a position to draw the appropriate conclusions.

4.10 With regard to the inconsistency of the dates in Ms. Gascon's statement, which has been pointed out by the author, the State party considers that it should be noted that in the first reference in the statement to the events, the word "June" has been struck through and replaced by "August". The word "June", however, can be found in two other places in connection with the threats made by the author. According to the State party, the only additional remedy open to the author, if he had had the written statement in his possession during the cross-examination, would have been to ask Ms. Gascon why the rectification was incomplete. Even if Ms. Gascon had provided an incorrect explanation, the State party considers that the author, according to the law of evidence as cited in the decision of the Minister of Justice, would have been unable to prove the inaccuracy of her statement.

4.11 The State party maintains that although Ms. Gascon in her written statement had sometimes referred to the month of June rather than August, both in her testimony in the preliminary investigation and in the trial she had placed the events in August. The decisive factor is that at his trial the author was perfectly aware of the nature of the offence with which he was charged and the manner in which he allegedly committed it.

4.12 In view of the fact that Ms. Gascon's written statement shows only a partial inconsistency with regard to the dates of the events, does not contradict the content of her testimonies and adds only secondary evidence, and that the Court was able to assess the credibility of Ms. Gascon and the author, the State party considers that the disclosure of this document furnishes no additional arguments for the author's defence.

4.13 The State party adds that, with regard to the aforementioned developments, the author benefited from the presumption of innocence. According to the State party, the judge based his ruling on evidence beyond all reasonable doubt furnished by the deputy Crown prosecutor in respect of the various elements of the offence in question.

4.14 With regard to the complaint concerning the consequences of the conviction, namely the difficulty of finding a job, the State party points out that under the Criminal Records Act, a person who has been convicted of an offence under an Act of Parliament (including the Criminal Code) may apply to the National Parole Board for a pardon in respect of that offence. In the author's case, such application may be made five years after the legal expiry of the probation period. The Canadian Human Rights Act also prohibits discrimination, including in the field of employment, on grounds of sex or a conviction for which a pardon has been granted. "A conviction for which a pardon has been granted" means "a conviction of an individual for an offence in respect of which a pardon has been granted by any authority under law and, if granted or issued under the Criminal Records Act, has not been revoked or ceased to have effect". Any person who considers that he or she is the victim of discrimination by an employer or a body covered by federal legislation may lodge a complaint with the Canadian Human Rights Commission. Article 18.2 of the Charter of Human Rights and Freedoms stipulates, moreover, that "No one may dismiss, refuse to hire or otherwise penalize a person in his employment owing to the mere fact that he was convicted of a penal or criminal offence, if the offence was in no way connected with the employment or if the person has obtained a pardon for the offence." Remedies are open to the author in the event of a violation of this article, in that he can lodge a complaint with Quebec's Commission des droits de la personne et de la jeunesse or take the case to the Human Rights Tribunal or to an ordinary court.

4.15 With regard to the complaint of the violation of article 2, paragraph 3, of the Covenant, the State party considers that this article does not constitute a substantive right as such but is appurtenant to the violation of a right guaranteed by the Covenant. In the State party's view, the author has not established the existence of a violation of this nature.

4.16 With regard to the complaint of violations of articles 3 and 26 of the Covenant, the State party maintains that there is no prima facie evidence of a violation. The State party points out that its policy is not discriminatory and is aimed at furthering equality between men and women. In addition, all actions by the police, the judiciary or other bodies in Quebec must observe the judicial rights and legal guarantees of all persons concerned, and in particular the impartiality and independence of the judiciary, as stipulated in the Charter of Human Rights and Freedoms and the Canadian Charter of Rights and Freedoms. In correspondence with a national who brought up this subject, the Commission des droits de la personne et des droits de la jeunesse in Quebec has already concluded that the policy is not discriminatory.

4.17 The State party maintains, subsidiarily, that the applicant's allegations are unfounded for the reasons set out above.

The author's comments on the State party's submissions

5.1 In his comments dated 30 August 2002, the author contests the State party's arguments of inadmissibility for failure to exhaust domestic remedies, on grounds of the undue delay in the decision of the Minister of Justice under section 690 of the Criminal Code, which was handed down on 7 May 2001 in respect of an application by the author dated 3 April 1995.

5.2 He also states that he is not seeking a re-evaluation of the Canadian courts' findings of fact and credibility, although he considers that the failure to disclose Ms. Gascon's statement, which was essential to his defence, can only be understood in the context of the trial. The author considers that the judge invented a scenario based on simple remarks made by the author during the trial which were subsequently used to support a trumped up charge, despite all the lies told by Ms. Gascon.

5.3 With regard to the non-disclosure of the document, the author contests the State party's arguments and points out that Ms. Gascon's written statement was essential for his full answer and defence. Unlike the State party, the author considers that the evidence of the defendant's criminal intent (*mens rea*) that emerges from this statement is relevant to the evaluation of his guilt. The author explains that while the complainant and the deputy prosecutor were able to prepare their strategies on the basis of the statement, the accused was deprived of this strategic information during the trial. The author explains that he would have been able to use the statement to cross-examine Ms. Gascon, not only on the "motive for the crime" and the dates of the events, but also on many other points, all of which, according to the author, would have been relevant in revealing the scope and gravity of Ms. Gascon's false accusations. Furthermore, in his opinion, even though the written statement contains the two accusations of death threats which led to his conviction, this in no way justifies the fact that the document was, as he alleges, concealed from him.

5.4 The author asserts that his case reveals an omnipresent sexism in Quebec's policy with respect to conjugal violence. As president of the association "Coalition pour la défense des droits des hommes du Québec" and vice-president of the Groupe d'entraide aux pères et de soutien à l'enfant, the author says that he has identified numerous cases of men who have been aggrieved, particularly by the non-disclosure of written statements by women complainants, and that this demonstrates how the courts treat men. The author considers that the judges acted maliciously in his case by not disclosing the aforementioned document, truncating the author's remarks and basing themselves on extreme feminist positions, under the overall protection of the Minister of Justice (who is a woman).

5.5 In his additional comments of 7 March 2003, 15 June 2003 and 26 October 2004, the author repeats his arguments concerning the exhaustion of domestic remedies, based essentially on the excessive delay in the decision of the Minister of Justice under section 690 of the Criminal Code. He adds that the Criminal Code does not provide for a right of appeal against that decision. Lastly, he asserts that the jurisprudence concerning applications for judicial review stemming from the case *William R. v. The Honourable A. Anne McLellan, Minister of Justice and Attorney General of Canada* (see note 4) is practically unknown, is not indexed and is in contradiction with the Criminal Code.

Supplementary submissions by the State party

6.1 In its submissions of 11 August 2003, the State party reiterates its position that the communication is inadmissible and, subsidiarily, unfounded.

6.2 The State party specifies that although the decision of the Minister of Justice (see paragraph 5.6) cannot be appealed against, it is nevertheless subject to judicial review by the Federal Court, as is any decision taken by a "federal board, commission or other tribunal", as currently defined (since 1 February 1992) by the Federal Courts Act. A decision taken under section 690 of the Criminal Code may thus be the subject of an application for judicial review to the Federal Court of Canada under article 18.1 of the Federal Courts Act. The Court may strike down the decision and return the case to the judge for a new decision if one of the grounds justifying its intervention is established (see paragraph 4.1). According to the State party, this is a remedy which could have given the author satisfaction. The State party adds that the *Williams* case, which is available on the Internet, clearly establishes the existence of a domestic remedy, and that the author cannot be excused for not having exhausted that remedy.

Admissibility considerations

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

7.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

7.3 With regard to the complaint of a violation of article 14, paragraph 3 (b) read together with article 2 (3), the Committee has taken note of the State party's arguments concerning inadmissibility for failure to exhaust domestic remedies (see paragraphs 4.1 and 6.2) and the author's comments in this regard. The Committee notes that the author admits that he did not submit an application for judicial review of the decision of the Minister of Justice of 7 May 2001 partly because of the excessive delay in taking the decision and partly because of the absence of public awareness of the jurisprudence in the *Williams* case, which the author further considers to be contrary to the Criminal Code (see paragraph 5.5). After examining the evidence in the file, the Committee considers, firstly, that the complaint concerning the excessive duration of the procedure under section 690 of the Criminal Code need not be addressed, since the author did not complain to the Minister of Justice about delays during the procedure. In addition, the Committee considers that the author has not effectively refuted the State party's submission that the application for judicial review to the Federal Court of Canada under article 18.1 of the Federal Courts Act was indeed an available and effective remedy. The Committee also considers that the author's argument that he was unaware of that remedy is not a valid argument, and that the State party cannot be held responsible for that situation. The Committee consequently finds that this part of the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

7.4 Concerning the complaints of violations of articles 3 and 26 of the Covenant, the Committee considers that the author's allegations that his sentence and the non-disclosure of Ms. Gascon's statement were the result of Quebec's allegedly sexist policy have not been sufficiently substantiated, for purposes of admissibility. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

7.5 Concerning the author's complaint of his difficulties in finding a job because of his criminal record, the Committee considers that the author has not exhausted domestic remedies with respect to this allegation of discrimination. Consequently, this part of the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

8.1 The Committee therefore decides:

(a) That the communication is inadmissible under articles 2 and article 5, paragraph 2 (b), of the Optional Protocol;

(b) That this decision shall be communicated to the author and to the State party.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

E. Communication No. 944/2000, *Chanderballi v. Austria* (Decision adopted on 26 October 2004, eighty-second session)*

Submitted by:	Chanderballi Mahabir (not represented by counsel)
Alleged victim:	The author
State party:	Austria
Date of communication:	18 May 1999 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 26 October 2004,

Adopts the following:

Decision on admissibility

1.1 The author of the communication is Chanderballi Mahabir, a citizen of Trinidad and Tobago, born in 1964. He does not invoke any specific provision of the Covenant. However, the communication appears to raise issues under articles 8, 10, 17 and 26[1] of the International Covenant on Civil and Political Rights (the Covenant). He is not represented by counsel.

1.2 The Covenant and the Optional Protocol entered into force for the State party on 10 December 1978 and 10 March 1988, respectively. Upon ratification of the Optional Protocol, the State party entered the following reservation to article 5, paragraph 2 (a): "On the understanding that, further to the provisions of article 5 (2) of the Protocol, the Committee provided for in article 28 of the Covenant shall not consider any communication from an individual unless it has been ascertained that the same matter has not been examined by the European Commission on Human Rights established by the European Convention for the Protection of Human Rights and Fundamental Freedoms."

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

The text of an individual opinion signed by Committee member Mr. Hipólito Solari Yrigoyen is appended to the present document.

The facts as submitted by the author

2.1 By judgement of 27 September 1993, the Regional Criminal Court of Graz convicted the author of several drug-related and other offences and sentenced him to nine years and eight months' imprisonment. The author served this sentence in different correctional facilities in Graz. On 11 May 1994 and 2 September 1995, he tried to escape from prison. He was released on 3 August 2001 and immediately deported to Port of Spain, Trinidad and Tobago.

2.2 While serving his prison term, the author was required to perform work,[2] receiving an hourly salary of 51.40 Austrian Schillings (ATS). In accordance with section 32, paragraph 2, of the Enforcement of Sentences Act, 75 per cent of the author's remuneration was deducted to cover his prison expenses. As an example, after a further deduction of 376.80 ATS for unemployment contributions, he received a net salary of 1.892.00 ATS (out of his gross earnings of 8.840.80 ATS) for 172 working hours in October 1998.

2.3 On 3 March 1997, the author requested permission to purchase a personal computer (PC) for study purposes. The prison authorities granted his request on 13 March 1997, since the author had completed a computer course and had shown good conduct and work performance. The authorities withdrew the author's permission to use a private PC and confiscated his computer, because he did not work in November 1997. His request of 5 November 1997 to have his computer returned was rejected three weeks later, on the ground that good work performance was a requirement for enjoying the privilege of using a private PC.[3] After another request had been denied on 16 December 1997 for identical reasons, the author, by letter of 25 February 1998, complained to the Ministry of Justice, claiming that the denial of access to his computer had exceeded the maximum permissible period of three months (section 111 of the Enforcement of Sentences Act).

2.4 On 27 July and 10 August 1998, the author requested permission to receive food parcels from his family every three months. Permission was denied in both cases, on the basis that the author served a drug-related sentence and was therefore precluded from receiving food parcels. On 17 September 1998, the author complained to the prison warden and, on 5 October 1998, to the Ministry of Justice, which rejected his complaint on 9 October. On 19 October, the author informed the United Nations and Amnesty International of these decisions, arguing that they amounted to racial discrimination, since other prisoners who were also serving sentences for drug-related offences could receive food parcels from their families and friends.

2.5 On 30 March 1999, the author complained to the Ministry of Justice, claiming violations of his rights as a prisoner, since a parcel with clothing from his aunt had been opened by the duty officer in his absence and without his signature, been resealed and returned to the sender. Although a prison social worker promised him that future parcels for him would be accepted, another package was again opened and returned to the sender soon thereafter. By letter of 5 April 1999, the author informed the Ministry of Justice that a social worker had told him that one of the prison guards, Major W., had expressed the intention of barring the author from the receipt of any parcels, should he refuse to withdraw his complaint to the Ministry of Justice.

2.6 On 10 May 1999, the prison authorities rejected the author's request to make his monthly telephone call to a family member, arguing that he had already made a call on 21 April 1999. The prison administration did not react to the author's clarification, on 16 May, that his request was for May rather than April.

2.7 In May 1999, the author bought a printer, but was not given any cartridges for this printer, although the purchase of cartridges had allegedly been authorized. When another request to collect the cartridges was denied on 20 May 1999, on the ground that the author had based his request on false information, he complained to the Ministry of Justice, alleging racial discrimination since two other prisoners, P.B. and H.S., had obtained cartridges. Meanwhile, the prison authorities again confiscated the author's PC.

2.8 On 18 May 1999, the author filed an application with the European Court of Human Rights, in which he complained about the above events. By decision of 19 November 1999, a Committee of three judges dismissed the application, in accordance with article 35, paragraph 4, of the European Convention, finding that the matters complained of "do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols".[4]

The complaint

3.1 The author claims that his unequal treatment in prison amounts to racial discrimination, on the basis that he is black and a foreigner. He also submits that the fact that he was forced to work to pay for his prison expenses, and that such work was a prerequisite for his computer to be returned, constitutes a modern form of slavery.

3.2 The author emphasizes that, while prison regulations allow inmates to receive underwear from home, as well as four food parcels per year, he was denied that right, unlike other prisoners also serving drug-related sentences. He argues that he was denied the possibility to make phone calls during the last three months before writing to the Committee.

3.3 The author criticizes that the deduction of unemployment contributions from the remuneration for his prison work by pointing out that, while Austrian prisoners were able to "reclaim this money" after serving their sentence, no such possibility existed for foreigners who leave the country after the end of their prison term.

3.4 The author claims that he was granted hearings with two prison officers in August 1996, but these meetings did not take place. Similarly, the only reaction from the Ministry of Justice to his complaints was to advise the author to settle his problems with the prison authorities directly.

The State party's observations on admissibility

4.1 On 23 February 2001, the State party challenged the admissibility of the communication, arguing that the author failed to exhaust domestic remedies, that the same matter has been examined by the European Court of Human Rights, and that it was not clear from the communication which of the author's Covenant rights were considered to have been violated.

4.2 The State party submits that, pursuant to sections 120 and 121[5] of the Enforcement of Sentences Act, the decisions of prison staff were subject to review by the prison superintendent and to further complaint to the superior penal authority or, as the case may be, by the Federal Ministry of Justice. Under articles 140 and 144 of the Federal Constitution, the author could have challenged the pertinent provisions of the Enforcement of Sentences Act for the receipt of parcels, telephone calls or the compulsory contributions to the unemployment scheme before the Federal Constitutional Court, e.g. by invoking the constitutional prohibition of discrimination or his right to property.[6] As the author failed to avail himself of these remedies, the State party concludes that the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

4.3 The State party argues that the communication is also inadmissible under article 5, paragraph 2 (a), of the Optional Protocol, because the author had already filed an application with the European Court.

4.4 Lastly, the State party argues that the communication contains insufficient information about the alleged violations of the author's Covenant rights, about possible steps taken by him to exhaust domestic remedies, and about the fact that the same matter was being examined by another procedure of international investigation or settlement.

Author's comments and additional information

5.1 On 22 May 2001, the author commented on the State party's admissibility submission, maintaining his arguments and stating that his "refusal" to exhaust domestic remedies was justified in the light of the material submitted by him.

5.2 On 4 June 2001, the author submitted additional information, documenting the prison authorities' decision of 29 March 2001 to reject his repeated requests for return of his PC, although his application to the European Court was stored on this computer; the dismissal of the author's complaint to the prison governor, as well as of his further complaint of 30 April 2001 to the Ministry of the Interior. In the latter, he claimed that he had been confined to his cell for 23 hours a day since 30 November 2000, allegedly because he was considered "a troublemaker".

The State party's additional observations on admissibility and on the merits

6.1 On 22 October 2003, the State party made additional submissions on the admissibility and, subsidiarily, the merits. It reiterates that the author did not exhaust domestic remedies, given that he himself mentioned his "refusal to exhaust all domestic remedies" in his submission dated 22 May 2001.

6.2 The State party invokes its reservation to article 5, paragraph (a), of the Optional Protocol, arguing that the same matter was already examined by the European Court of Human Rights. Although the reservation explicitly only referred to matters which have already been examined by the European Commission of Human Rights, it was clear from the Committee's jurisprudence that the reservation also applied to cases in which the European Court has previously examined the same matter. The European Court "examined" the matter, when declaring the application inadmissible under article 35, paragraph 4, of the European Convention, on the ground that the author's complaints "do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols". The Court therefore based its decision not solely on procedural grounds, but on a substantive assessment of the author's claims.

6.3 For the State party, the communication is also inadmissible under articles 2 and 3 of the Optional Protocol, as the author did not substantiate his sweeping allegations and because some of his claims are incompatible *ratione materiae* with the provisions of the Covenant. Thus, his obligation to work in prison, which primarily served the rehabilitation of prisoners by preparing them for the labour market rather than the recovery of prison expenses, was not covered by the notion of "forced or compulsory labour", pursuant to article 8, paragraph 3 (c) (i), of the Covenant. Similarly, the use of a personal computer in prison is not covered by article 10 of the Covenant, which aims at the protection of the basic needs of prisoners, such as food, clothing, medical supply, regular exercise etc., all of which were satisfied in the author's case.

6.4 On the merits, the State party submits that the enforcement measures complained of did not constitute discrimination, as they were justified by objective criteria. As for the confiscation of the author's PC, this measure was justified by his failure to report for work. Following the theft of meat from the prison butchery, where the author had worked until 29 October 1997, he was placed under strict house arrest and his privilege to use a computer was withdrawn until after he had started to work again in February 1998. Following further incidents, involving the insult of a prison officer, on 30 November 2000, as well as his refusal, on 23 and 30 January 2001, to move to another cell assigned to him, the author was subjected to strict house arrest for a period of 12 days in December 2000 and for two periods of seven and eight days in early 2001 without specifying the particular dates. He did not perform work during the period from 5 December 2000 to 21 May 2001 and his computer was not returned to him until his release from prison on 3 August 2001.

6.5 The State party submits that the author was treated in compliance with the minimum standard required by article 10 of the Covenant, as his basic needs, including food, clothes, medical supply, sanitary hygiene, light heating and regular exercise were at all times ensured.

6.6 The State party submits that, by falsifying an order code, the author deceived the prison authorities about the purchase of a scanner head for his printer, pretending that he only wanted to buy ink cartridges. The purchase of a scanner head was not authorized because of security concerns.

6.7 The State party considers that the denial of permission to receive parcels was justified, because the author was a security risk, since he twice attempted to escape from prison. The author was allowed to make phone calls at least once a month. Moreover, under article 17, read in conjunction with article 10, of the Covenant, the author was only entitled to communicate with his family and friends by correspondence and by receiving visits.

6.8 Regarding the author's obligation to pay contributions to the unemployment scheme, the State party argues that within a risk community grouping together the members of a certain profession or group, the pension concept prevailed over the insurance concept, in accordance with the jurisprudence of the Constitutional Court. Therefore, compulsory contributions to a social insurance scheme must not necessarily result in the payment of insurance benefits. The major aim of the inclusion of prisoners in the unemployment scheme[7] was to ensure their reintegration into society. While the author did not receive unemployment benefits because he was deported immediately after his release, a substantial number of former prisoners benefited from the scheme.

Author's comments

7. On 15 December 2003, the author contended that he had fully substantiated his claims, and that the State party's observations of 22 October 2003 are without merit.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

8.2 The Committee notes that the State party has invoked its reservation under article 5, paragraph 2 (a), of the Optional Protocol, which precludes the Committee from considering claims if the same matter has previously been examined by the European Commission on Human Rights. The Committee recalls that, for purposes of ascertaining the existence of parallel or successive proceedings before the Committee and the Strasbourg organs, the European Court of Human Rights has succeeded to the former European Commission by taking over its functions, following the entry into force of Protocol No. 11 to the European Convention.[8] Consequently, the State party's reservation applies also to situations where the same matter has previously been examined by the European Court.[9]

8.3 As to the question of whether the European Court has "examined" the matter, the Committee recalls its jurisprudence that where the Strasbourg organs have based a decision of inadmissibility not solely on procedural grounds,[10] but on reasons that involve even limited consideration of the merits of the case, the same matter has been "examined" within the meaning of the respective reservations to article 5, paragraph 2 (a), of the Optional Protocol.[11] It considers that, in the present case, the European Court proceeded beyond an examination of purely procedural admissibility criteria, finding that the author's application "[did] not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols".[12]

8.4 The issue before the Committee is therefore whether the subject matter of the present communication constitutes the "same matter" as the one examined by the European Court. The Committee notes that the author's application under the European Convention of Human Rights was submitted on the same day as his communication under the Optional Protocol and that the State party's explicit contention that the two complaints concerned the same issues has not been contested by the author. Consequently, and as the State party has invoked its reservation relating to article 5, paragraph 2 (a), of the Optional Protocol, the Committee concludes that the same matter has already been examined by the European Court of Human Rights.

8.5 However, the European Court was able to examine the same matter only insofar as the substantive rights protected under the European Convention converge with those protected under the Covenant, and to the extent that the events complained occurred prior to 18 May 1999, when the author filed his application with the European Court. The Committee observes that articles 8 and 17 of the Covenant largely converge with articles 4 and 8 of the European Convention. However, neither the European Convention nor its Protocols contain provisions equivalent to articles 10 and 26 of the Covenant. Accordingly, the Committee considers that the State party's reservation applies insofar as the case raises issues under articles 8 and 17 of the Covenant and to the extent that it relates to events which took place prior to 18 May 1999. This part of the communication is therefore inadmissible under article 5, paragraph 2 (a), of the Optional Protocol.

8.6 As regards the author's claim that the deduction of unemployment contributions from the remuneration for his prison work amounted to discrimination, in breach of article 26 of the Covenant, since it was clear that he would on his eventual release not receive any unemployment benefits as a foreigner who was to be deported to his country of origin directly following his release from prison, the Committee notes, on the basis of the material at its disposal, that the author had not, at the time of his complaint to the Committee or afterwards, raised this claim before the Austrian authorities and courts. Apart from contending that his "refusal" to exhaust domestic remedies was justified, the author failed to address the State party's argument that he could have challenged any possible discriminatory effect of the compulsory contributions to the unemployment scheme before the Constitutional Court, or to indicate whether and, if so, why the remedy of constitutional complaint would have been ineffective or unavailable to him in the specific circumstances of his case. The Committee therefore considers that the author has failed to exhaust domestic remedies in this regard, and concludes that this part of the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

8.7 As to the remainder of the communication, the Committee observes that the author has not substantiated, for purposes of admissibility, that his obligation to perform work at prison, the degree of the alleged restriction of his telephonic communication with family members, or any other measures taken by the prison authorities, in particular the confiscation of his computer and the denial of permission to buy equipment for his printer or to receive food and other parcels from his family, violated his right under article 10 of the Covenant to be treated, as a prisoner, with humanity and with respect for the inherent dignity of the human person or that he, as a foreigner or on account of his being black, was discriminated against within the meaning of article 26 of the Covenant.

8.8 The Committee also notes the contradiction between the author's complaint to the Ministry of the Interior that he was confined to his prison cell for 23 hours a day from 30 November 2000 to 30 April 2001 and the State party's submission that, during the period in question, the author was placed under strict house arrest on three occasions, for different breaches of the prison rules on 30 November 2001 and on 23 and 30 January 2001, and that the duration of these house arrests was limited to twelve, seven and eight days, respectively. The Committee notes that the author has not commented on this discrepancy, and therefore concludes that he has failed to substantiate this claim, for purposes of admissibility. It follows that the communication is inadmissible under article 2 of the Optional Protocol, insofar as it raises issues under article 10 of the Covenant.

9. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under articles 2 and 5, paragraph 2 (a), and (b), of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] Upon ratification of the Covenant, the State party entered the following reservation in relation to article 26 of the Covenant: "Article 26 is understood to mean that it does not exclude different treatment of Austrian nationals and aliens, as is also permissible under article 1, paragraph 2, of the International Convention on the Elimination of All Forms of Racial Discrimination."

[2] See section 44 of the Federal Act on the Enforcement of Prison Sentences and Preventive Measures in Connection with Imprisonment of 1969 (Enforcement of Sentences Act): "(1) Every prisoner who is physically able to work has the obligation to work. (2) Prisoners obligated to work shall perform the work assigned to them. Prisoners shall not be assigned work that entails life risks or danger of serious damage to their health."

[3] See section 24 of the Enforcement of Sentences Act: "(1) A prisoner who shows his cooperation in achieving the purposes of his sentence, shall upon his request be granted appropriate privileges. […] (4) If a prisoner abuses the privileges granted to him or if the conditions on which they were granted subsequently cease to exist, the privileges shall be restricted or withdrawn."

[4] European Court of Human Rights, decision on admissibility of application No. 51187/99 (*Chanderballi Mahabir v. Austria*), 19 November 1999.

[5] Section 121, paragraph 4, of the Enforcement of Sentences Act reads: "Unless a complaint concerns the prison governor, he or his deputy shall inform the prisoner about the decision taken on the complaint. At the same time, the prisoner shall be informed about the possibility of filing a further complaint. Upon written request, the prisoner shall also be issued a written copy of the decision."

[6] Article 1 of Protocol No. 1 to the European Convention read in conjunction with article 14 of the European Convention.

[7] Section 66a of the Austrian Unemployment Insurance Act provides that persons who serve a prison term and comply with their duty to work are liable to pay unemployment benefits, so that the respective period may be counted towards their eligibility for unemployment benefits after their release.

[8] Communication No. 989/2001, *Kollar v. Austria*, decision on admissibility adopted on 30 July 2003, at para. 8.2.

[9] Ibid., at para. 8.3.

[10] Communication No. 716/1996, *Dietmar Pauger v. Austria*, at para. 10.2

[11] Communication No. 121/1982, *A.M. v. Denmark*, decision on admissibility adopted on 23 July 1982, at para. 6; communication No. 744/1997, *Linderholm v. Croatia*, decision on admissibility adopted on 23 July 1999, at para. 4.2.

[12] Communication No. 744/1997, at paras. 3 and 4.2.

APPENDIX

Individual opinion of Committee member
Mr. Hipólito Solari Yrigoyen (dissenting)

My partial disagreement is based on the considerations below.

Consideration of admissibility

Regarding the author's assertion that he was punished by being confined to his cell for 23 hours a day, the Committee notes that the State party admits the punishment and the description given of it, but disagrees with how long it lasted. The author says it lasted from 30 November 2000 to 30 April 2001; the State party says it fell into three parts lasting respectively twelve, seven and eight days, making a total of 27 days.

The Committee observes that the State party has given incomplete information, since it does not mention the dates when the author was due to undergo his punishment and fails to explain how it was able to give the author the opportunity to take exercise "at all times", thereby treating him in a manner consistent with the minimum rules laid down in article 10 of the Covenant (as stated in paragraph 6.5), while admitting that he was shut in his cell 23 hours a day for 27 days. The Committee points out that the State party is required to furnish "explanations or statements clarifying the matter" as stated in article 4, paragraph 2, of the Covenant.

The Committee also observes that the author rejected the State party's comments of 22 October 2003 as without merit, as stated in paragraph 7. The author thus disagrees with the shorter length of punishment claimed by the State party.

It follows from the above that the communication is admissible under article 2 of the Optional Protocol, inasmuch as it raises issues under article 10 of the Covenant.

Consideration on the merits

The Committee must determine, in considering the merits of the case, whether the confinement to which, according to the author's letter of 22 May 2001 providing additional information, he was subjected by the State party constituted a violation of article 10 of the Covenant. It notes that the author and the State party concur that the punishment consisted in confinement of the prisoner to his cell for 23 hours a day.

The Committee points out that the essential aim of any penitentiary system should be the reformation and social rehabilitation of offenders, and that punishments should pursue those objectives provided that they do not encroach upon the humane treatment to which persons deprived of their liberty are entitled (article 10, paragraphs 1 and 3, of the Covenant). The Committee notes that the State party has neither alluded to those objectives nor argued that the punishment inflicted on the author was intended to further them.

The Committee concludes that the extremely harsh punishment inflicted on the author was, given its possible mental and physical consequences and the length of time for which it was inflicted, inconsistent with article 10 of the Covenant which requires all persons deprived of their liberty to be treated with humanity and with due respect for the inherent dignity of the human person. Pursuant to article 4, paragraph 4, of the Optional Protocol, the Committee finds that the facts alleged reveal a violation of article 10 of the International Covenant on Civil and Political Rights.

(*Signed*): Hipólito Solari Yrigoyen
Geneva, 27 October 2004

[Done in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

F. Communication No. 954/2000, *Minogue v. Australia* (Decision adopted on 2 November 2004, eighty-second session)*

Submitted by:	Craig Minogue (not represented by counsel)
Alleged victim:	The author
State party:	Australia
Date of communication:	23 September 1999 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 2 November 2004,

Adopts the following:

Decision on admissibility

1. The author is Craig Minogue, an Australian citizen, currently serving life imprisonment at Barwon Prison, Victoria, Australia. He claims to be a victim of violations by Australia of article 2, paragraphs 1, 2, 3 (a) and (b), article 9, paragraph 4, article 10, paragraphs 1, and 2 (a), article 14, paragraphs 1, 3 (b) and 5, and articles 26 and 50, of the International Covenant on Civil and Political Rights and article 1 of the Optional Protocol. He is not represented by counsel. The Optional Protocol came into force for the State party on 25 December 1991.

The facts as presented by the author

2.1 In March 1986, the author was arrested with four other men, in relation to the murder of a police officer in Australia. In 1988, despite his claim of innocence, he was found guilty of murder, convicted and sentenced to life imprisonment, with a minimum imprisonment of 30 years. He then used all the appeal procedures available to him, to no avail.

2.2 When in the mid-1990s, the author became aware of serious criticisms against two witnesses at his trial, he considered a review of his case. Between July 1996 to August 1998, while imprisoned at Barwon Prison, he attempted to prepare a petition for mercy and a new appeal based on new evidence. He alleges that in the process, he was restricted by the prison authorities from accessing legal resource materials, computers, and his lawyers.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen and Mr. Roman Wieruszewski.

Under rule 90 of the Committee's rules of procedure, Mr. Ivan Shearer did not participate in the Committee's consideration of the case.

He was further restricted in his preparation of his petitions by the obligation to move cell every month, allegedly for security purposes. He claims that he was placed on cell rotation as a form of punishment for making a complaint to the Human Rights and Equal Opportunities Commission (HREOC) and that this is highlighted by the fact that he was the only prisoner subjected to such rotation. In addition, he claims that prison officers were able to gain access to documents relating to his petitions.

2.3 By letter of 14 November 1996, the author complained to the HREOC that the prison authorities of Victoria were impeding his efforts to prepare a petition of mercy. On 6 May 1997, his complaint was rejected as the HREOC lacked jurisdiction in the matter. The author sought to have the HREOC decision reviewed by the Administrative Appeals Tribunal, but was advised that the matter was outside their jurisdiction. The author's attempt to have the HREOC decision reviewed by the Commonwealth Ombudsman was rejected on the same basis.

2.4 On 24 December 1997, the author filed a complaint against the HREOC in the Federal Court of Australia. A member of the International Commission of Jurists with an *amicus curia* status was assigned to the author as legal assistance. On 12 October 1998, the court dismissed the complaint. This decision was appealed to the Full Federal Court of Australia. Additional to his claim before the Full Federal Court, the author claimed not to have been provided with necessary legal assistance before the first instance court. On 19 February 1999, the Federal Court dismissed the appeal. The author did not appeal to the High Court of Australia, as this remedy would take a further two years, and thus in his view be "unreasonably prolonged".

The complaint

3. The author claims violations of article 2, paragraphs 1, 2, 3 (a) and (b), article 9 paragraph 4, article 10, paragraph 1, article 14, paragraphs 1, 3 (b) and 5, and articles 26 and 50 of the Covenant, and article 1 of the Optional Protocol to the Covenant. These claims are said to arise from the regular change of cells and the restrictions referred to in paragraph 2.2, which are said to have thwarted his attempts to have his case reviewed.

Pre-admissibility submissions from the State party and the author's comments thereon

4.1 In June 2001, the State party submitted a "request for advice on whether the complaint was ongoing". It advised the Committee that the author was transferred to Port Phillip Prison in September 1999. The transfer was negotiated between the Sentence Management Unit of the Office of the Correctional Services Commissioner in Victoria (which has responsibility for managing the transfer of prisoners between prisons), the Governor of Barwon Prison and the General Manager of Port Phillip Prison. The author was transferred "in response to a variety of management issues," and, subject to the security, safety and overall needs of the prison system, would continue to be accommodated there for several months while he was pursuing issues with respect to his appeals. Given the author's transfer, the State party submits that it is unaware of any facts that could give the Committee any grounds for concern in relation to Covenant issues. It explains to the Committee the facilities that are currently available to the author.[1]

4.2 On 11 July 2001, the author responded, acknowledging that the matters raised in the initial communication were no longer relevant to his current situation, that they occurred between July 1996 and August 1998 and that the matters complained of no longer applied. However, he states that he wishes to maintain the communication as his rights were violated while detained at Barwon prison and the issue of there being no domestic remedies for violations of Covenant rights is not addressed by the State party. He also raises a new claim of a violation of article 10, paragraph 2 (a), as convicted and unconvicted prisoners are not segregated in Port Philip prison. According to the author, the only reason he was moved to Port Philip was because he had filed a motion against Barwon Prison in the High Court claiming violations of his rights under the Covenant.

4.3 On 28 November 2001, after receiving the author's response, the State party requested further advice as to whether the complaint was still under active consideration. It disputes the author's argument that the present circumstances of his incarceration are irrelevant to his complaint, which arises from his individual experience on particular days, with particular individuals, and not from an express legislative provision of general application. It is an essentially personal complaint alleging frustrated access to computer equipment and legal resources, resulting in the alleged denial of access to court.

4.4 While not conceding the substance of the author's complaint, the State party submits that his circumstances have changed: his concerns have been met and there is no longer any complaint to answer. On the author's own admission, his transfer to Port Philip Prison has resolved his complaints about access to computer equipment and legal resources, and he is allowed to stay at Port Philip Prison for the duration of his legal actions, subject to overall safety and security concerns. The State party therefore requests the Committee to discontinue the communication.[2]

4.5 The State party contends that the communication is inadmissible as the author is no longer a victim as required by article 1 of the Optional Protocol. In circumstances where the author has in fact obtained the benefit of his claim, the Committee has in the past found that the author can not continue his or her claim because there is no victim as required by article 1 of the Optional Protocol.[3] Thus the provision of a remedy by a State party negates the basis for the international claim. Like the condition that applicants to international procedures must previously exhaust domestic remedies, the requirement that there be a victim recognizes the primary role of the domestic legal system, and the subsidiary role of the international mechanisms, in providing remedies. The Committee's view is consistent with the European human rights jurisprudence.[4] The State party submits it was not intended that the Committee would spend its limited time considering issues in the abstract, removed from concrete circumstances.

4.6 As to the author's comment that remand prisoners and convicted prisoners are held together at Port Philip Prison, and that this may infringe article 10, paragraph 2, of the Covenant, the State party submits that the benefit of the Covenant provision is clearly for accused prisoners to claim, not for sentenced ones in the author's position. In addition, the State party refers to its reservation to article 10, paragraph 2, in which it states that the principle of segregation is an objective to be achieved progressively.

4.7 Should the Committee consider the complaint ongoing, the State party reserves the right to provide full comments on admissibility and merits. On 21 December 2001, on behalf of the Committee, the Special Rapporteur on new communications requested the State party to respond in full on the admissibility and the merits of the case.

State party's response on admissibility and the merits and the author's comments thereon

5.1 On admissibility, the State party reiterates the arguments made in its request to ascertain whether the complaint was still under active consideration. It also argues that the complaint is inadmissible in so far as the author's allegations relate to access to documents, lawyers and computers, because the author has failed to exhaust domestic remedies. This argument does not apply to the allegations that articles 26 and 50 of the Covenant, and article 1 of the Optional Protocol, were violated, as the author exhausted domestic remedies in relation to the HREOC's decision not to hear this complaint.

5.2 According to the State party, the author had three opportunities to exhaust domestic remedies. Firstly, as a prisoner in Barwon Prison, he could lodge a complaint with the State Ombudsman of Victoria. Under the Ombudsman Act 1983 (Vic), the Ombudsman should make independent inquiries into administrative action taken by relevant public bodies. During reception, prisoners are advised about their right to make complaints and requests to various persons and bodies. Where the Ombudsman investigates a complaint and is satisfied that action is required, he or she must send a report and recommendations to the principal officer of the appropriate authority and send a copy to the responsible Minister. Where action recommended by him is not taken within a given time, the Ombudsman may directly report and make recommendations to the Governor in Council. Where a report or recommendations have been sent to the Governor in Council, the Ombudsman may submit a report before both Houses of the State Parliament. In this way, pressure and public scrutiny will often result in the Ombudsman's recommendations being implemented.

5.3 Secondly, the author could have complained to the Minister and the Secretary to the Department of Justice, under section 47 (1) (j) of the Corrections Act 1986 (Vic). Thirdly, he could have brought a case to court. The author did bring two cases to the Federal Court, relating to the decision of the HREOC not to examine his case, to constitutional issues relating to the HREOC Act 1986 (Cth), and relating to the direct, verbatim incorporation of the right in the Covenant into Australian domestic law. However, no domestic court has so far decided whether the author has a right under Australia's existing domestic law, to access his documents, lawyers and computers. The author does have a right to claim, before the courts, that he was denied access to them and that this was confirmed by the Federal Court, which informed the author that he could bring an action relating to his access to documents, lawyers and computers.

5.4 The State party dismisses the allegations relating to access to lawyers as inadmissible for lack of substantiation. The author has not provided any proof relating to the alleged denial, by the Victorian authorities, to allow him access to lawyers. All the material he submitted relates to access to legal documents and computers. As to the allegation of a violation of article 2, paragraphs 3 (a) and (b), the State party submits that the author has not demonstrated how it has refused to grant him access to an effective remedy.

5.5 The State party submits that some of the authors allegations are inadmissible *ratione materiae*: rights protected under article 2 of the Covenant are accessory in nature and not free standing; article 10 does not relate to a claim of restrictions to lawyers and legal documents; and as no determination of a criminal charge is being made against the author, and neither the petition of mercy or the fresh evidence appeal is a "defence" within the meaning of the Covenant, article 14, paragraph 3 (b), does not apply to the author's case. The author's allegation concerning the review of his conviction and sentence, and the preparation of a new evidence appeal and his petition of mercy, properly relate to article 14, paragraph 5, and not to article 9, paragraph 4. However, in so far as the author alleges that interference with the preparation of a petition of mercy violates article 14, paragraph 5, it is submitted that such a petition is not an appeal to a higher tribunal, so that any alleged interference in its preparation would not breach this provision.

5.6 On the merits, the State party submits that the mere fact that the author could not pursue a remedy through the HREOC, a body with limited jurisdiction, does not mean that he could not pursue a remedy through another body (see paragraphs 5.2 and 5.3 above). None of the restrictions placed on the author's access to legal documents and lawyers is said to reach the threshold required for treatment in violation of article 10, paragraph 1.

5.7 As to the allegations under articles 26 and 14, paragraph 3 (b), the State party submits that restricted access to documents, lawyers and computer facilities was reasonable and objective in the author's circumstances. The very nature of imprisonment necessarily places restrictions on a prisoner's access to legal documents. In particular, safety and security concerns must be balanced with a prisoner's desire to keep all of his legal documents in his cell. The governor of Barwon Prison continually reviewed the number of boxes of documents in the author's cell, to assess its safety and security, as the cell had been identified as a fire risk by the Fire Risk Assessment Officer of the prison. After each assessment, the governor increased the number of boxes the author could keep in his cell. He could access the boxes of documents by trading boxes in his cell for others in storage. By 6 February 1997, he had been permitted to retain 24 boxes of legal documents in his cell. As to the claim that he had to regularly move cells because he had made complaints regarding his access to legal documents and that being required to move cells every week disrupted the preparation of a fresh appeal and a petition of mercy, the State party argues that he was subjected to rotation as he was considered a high security risk.

5.8 The author was permitted to have access to lawyers in accordance with the rules and regulations applying to Barwon Prison between July 1996 and August 1998. He received four visits from lawyers during this period. In addition, as evidenced by copies of correspondence annexed to his initial complaint, he could contact numerous lawyers and other members of the legal profession. As to access to his personal computer, the State party concedes that he did not have such access from June 1996 to 24 November 1997, as during this period no new computers were allowed into the prison so that an audit could be undertaken. Unfortunately, the author's computer malfunctioned during the period in question and could not be replaced. Once the audit was over, the author was permitted to buy a new personal computer. On article 14, paragraph 5, the State party submits that the author's current efforts to submit a new appeal with fresh evidence and a petition of mercy are not being hampered by the authorities.

5.9 The State party understands that the author's allegation under article 26 relates to the fact that the HREOC does not have jurisdiction to hear his complaint, it points out that there are other Victorian state agencies competent to hear his substantive complaint (see paragraphs 5.2 and 5.3 above). If his argument is that he is not receiving equal protection of the law, because he, unlike persons complaining against Commonwealth agencies, cannot bring a complaint under the HREOC Act 1986 (Cth), it submits that what is at issue is not whether he can file a complaint under a particular law or before a particular body but rather whether he can bring a complaint before a decision making body competent to decide on the substance of his complaint.

5.10 On 20 December 2002, the author reiterated his previous claims and concedes that after challenging his placement on the security list, he was not required to move cells after September 1997. As to the claim of fire risk he submits that both this risk and the alleged security risk were "invented" by the prison authorities to deny prisoners access to legal documents. As to the State party's arguments on the "victim" requirement, he claims that failure to consider the case on the merits on this reason alone would legitimize the violation of his rights, and encourage the authorities temporarily to change an individual's circumstances.

5.11 As to the argument of failure to exhaust domestic remedies, the author contends that complaints to the Ombudsman and through the court system would be ineffective. In relation to the Ombudsman, he argues that although his/her function is to conduct investigations of administrative action, the function is rarely used. Informal inquiries are preferred, but although this method may be more expedient, it is the author's view that prison and police officers do not confess guilt when asked to respond to such an informal inquiry. He refers to various annual Ombudsman reports, including the 2001/2002 report, in which 699 complaints were made and only one was investigated and sustained. In relation to the courts, he claims that they are ineffective, as they consistently refuse to rule in favour of prisoners and are reluctant to interfere in the operation of prisons. As to the possibility of filing a complaint with the prison manager or the Minister, he submits that it is unrealistic to expect a prisoner to complain to those who hold him in custody.

5.12 On 7 July 2004, a further letter from an organization claiming to assist the author stated that he had been transferred back to Barwon Prison, and that restrictions have been placed on his ability to access his legal materials, including his files relating to his case before this Committee. It provides a copy of a letter, dated 1 June 2004, in which the author requested access to his legal materials. This request was refused.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The State party argues that the author's claims relating to his imprisonment in Barwon Prison are inadmissible as the author is not a "victim" within the meaning of article 1 of the Optional Protocol. It argues that by having moved the author to Port Philip Prison, where he had access to all necessary information for the purposes of preparing his petitions, his grievances were remedied. The Committee notes that the author does not dispute this but that he still wishes the Committee to consider his claims. The Committee recalls its jurisprudence that where a violation of the Covenant is remedied at the domestic level prior to the submission of the communication, it may consider a communication inadmissible on grounds of lack of "victim" status or absence of a "claim".[5] In the present case, it notes that the author submitted his communication on 23 September 1999, relating to events occurring between July 1996 and August 1998. Although the author's claims were apparently remedied by the State party prior to submission of the complaint, the author has in his latest submission informed the Committee that he has been transferred back to Barwon Prison where at least some of his original complaints are again valid. In these circumstances, the Committee finds that the author may be considered a "victim" within the meaning of article 1 of the Optional Protocol, and his claims are not inadmissible merely because the State party provided him with relief at one point.

6.3 As to the requirement of exhausting domestic remedies, the Committee considers that the author has, by making use of several judicial and quasi-judicial procedures in order to seize various domestic authorities of his grievances, complied with the requirement set out in article 5, paragraph 2 (b) of the Optional Protocol.

6.4 As to the claim under article 9, paragraph 4, the Committee finds that, as the author is currently serving the minimum duration of a prison sentence as decided by a court of law, his claim does not fall within the purview of this provision. As to the claims under article 14 paragraphs 3 and 5, the Committee finds that as the author is not under a criminal charge and had his conviction and sentence reviewed by a higher tribunal, the provisions of these articles are not applicable. As to article 14, paragraph 1, the Committee finds that his claims relate neither to the conduct of judicial authorities nor to access to court in a matter that would constitute a suit at law in the meaning of this provision. For these reasons, the Committee finds that these claims are incompatible with the provisions of the Covenant and are, accordingly, inadmissible *ratione materiae*, pursuant to article 3 of the Optional Protocol.

6.5 As to the author's claim that convicted and unconvicted prisoners are not segregated in Port Philip Prison, the Committee notes that the State party has invoked its reservation to article 10, paragraph 2 (a), of the Covenant which states that, "In relation to paragraph 2 (a) the principle of segregation is an objective to be achieved progressively". It recalls its previous jurisprudence that while it may be considered unfortunate that the State party has not so far achieved its objective to segregate convicted and unconvicted persons in full compliance with article 10, paragraph 2 (a), it cannot be said that the reservation is incompatible with the object and purpose of the Covenant.[6] This part of the author's claim is, therefore, incompatible with the provisions of the Covenant and is, accordingly, inadmissible *ratione materiae*, pursuant to article 3 of the Optional Protocol.

6.6 As to the claim of a violation of article 1 of the Optional Protocol, the Committee takes the view that, although it has on its own initiative established a breach of the right of the individual complaint procedure enshrined in the Optional Protocol, in cases where a State party has executed or deported a person while an individual communication has been under the Committee's consideration, it takes the view that the author has not made out a case of a breach of the right in question. Consequently, this part of the communication is inadmissible *ratione materiae*, under article 3 of the Optional Protocol.

6.7 As to the claim under article 26 of the Covenant, the Committee finds that the author has failed to present any arguments substantiating this claim. Consequently, the Committee finds this part of the communication inadmissible, pursuant to article 2 of the Optional Protocol.

6.8 As to the remaining claims made under article 10, paragraph 1, read in conjunction with article 2 of the Covenant, the Committee has reviewed the author's claims against the provisions of the United Nations Standard Minimum Rules for the Treatment of Prisoners. Taking note of the State party's submissions relating to the author's conditions of detention, including his access to legal documents and lawyers and the availability of various remedial mechanisms on the domestic level, the Committee considers that the author has not substantiated, for purposes of admissibility, a claim that these provisions have been violated. Consequently, the Committee finds this claim inadmissible, pursuant to article 2 of the Optional Protocol.

6.9 Concerning the claim under article 50 of the Covenant, the Committee refers to its constant jurisprudence that it is only with respect to articles in Part III of the Covenant, interpreted as appropriate in the light of the articles in Parts I and II of the Covenant that an individual communication may be presented to it. Accordingly, article 50 cannot give rise to a free-standing claim that is independent of a substantive violation of the Covenant. Thus, the Committee finds this claim inadmissible *ratione materiae*, pursuant to article 3 of the Optional Protocol.

7. Accordingly, the Committee decides:

(a) That the communication is inadmissible, under articles 2, and 3 of the Optional Protocol;

(b) That this decision be transmitted to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] He has been accommodated in a single cell according to his wishes; has large volumes of legal texts in his cell, including hard backed books, and a large number of legal documents; has a personal computer with a CD drive, printer, diskettes and paper (for printing) in his cell; and is enrolled in full-time education which enables him access to the prison library in excess of what is normally timetabled for his unit. The library has five computers, three of which are common use computers for prisoners and one has a dedicated intranet link to the local Hobsons Bay Library database. All the computers in the library are linked to the main prison server which allows access to a complete collection of the Butterworths Legal CD-Rom collection (an up-to-date loose leaf legal service). Prisoners are allowed phone access to their lawyers. If a lawyer consents to receive calls, the prisoner may put the lawyer's name on his phone list. Prisoners can have up to 10 phone numbers on their nominated phone list at any one time and these can be changed by submitting the appropriate alteration request form. We are advised that access to a phone should not be problem where the author is accommodated nor should it be a problem at any other prison. If he wishes to lodge a fresh evidence appeal, the appropriate appeal forms are available at Port Phillip Prison and other prisons. If he wishes to lodge a petition of mercy, he has access to facilities to prepare the petition. No forms are required for the petition of mercy, only a letter to the Victorian Government to instigate a review of the application is required. The State party has been advised that the author has not yet lodged either a fresh evidence appeal or a petition of mercy. The author has access to lawyers.

The Victorian Legal Aid Prison Advice Service (VLA) may visit the Prison as often as it wishes, as can lawyers representing the author within the professional visits time frame. Professional visits are seven days a week, generally between 9 a.m. and 6 p.m.

[2] The State party refers to the Committee's decisions in *Waksman v. Uruguay*, case No. 31/1978, Discontinued, *Ramsey v. Australia*, case No. 655/1995, Discontinued. See also Novak CCPR Commentary. Engel 1993, p. 673.

[3] *Van Duzen v. Canada*, case No. 50/1979, Views adopted on 25 July 1980. In this case, the Committee did not consider the substantive issues, finding that the author had in fact obtained the benefit claimed.

[4] The European Commission and Court have acknowledged that "an applicant may no longer claim to be a victim if his claims have been satisfied in full by the authorities of the State party at the domestic level, since the applicant is then placed in the same position as if the events which gave rise to his claim had not occurred". Preikhzas case application No. 6504/74, report of 13 December 1978, DR 16, pp. 16, 17. It also refers to the case of *E.W. et al. v. The Netherlands*, case No. 429/1990, Views adopted on 8 April 1993.

[5] *Dergachev v. Belarus*, case No. 921/2000, Views adopted on 2 April 2002, and *Wilson v. The Philippines*, case No. 868/1999, Views adopted on 3 October 2003.

[6] *Cabal and Pasini v. Australia*, case No. 1020/2001, Views adopted on 7 August 2003.

G. Communication No. 958/2000, *Jazairi v. Canada* (Decision adopted on 26 October 2004, eighty-second session)*

Submitted by:	Nuri Jazairi (not represented by counsel)
Alleged victim:	The author
State party:	Canada
Date of communication:	10 August 2000 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 26 October 2004,

Adopts the following:

Decision on admissibility

1. The author of the communication is Nuri Jazairi, a Canadian national, born in 1941 in Iraq. He claims to be a victim of violations by Canada of article 26, and of articles 2, paragraphs 1 and 2, 19, paragraph 1, and 50 taken in conjunction with article 26, of the International Covenant on Civil and Political Rights. He is not represented by counsel.

The facts as presented

2.1 The author is an associate professor of economics at York University in Toronto. The university is not part of the State party's federal or provincial government. In August 1984, after having applied for promotion to a full tenure professorship, a university promotions committee received and considered two unsolicited letters from other professors of the author's faculty that were critical of him. In September 1984, a further university promotions committee withdrew the letters from the file, but in apparent violation of its procedures heard in camera representations by the Chair of the author's faculty about the author's application, without disclosing those representations to him or allowing him an opportunity to respond. In December 1984, the Committee recommended that the author's application for promotion be delayed, and, in November 1985, the university's president accepted this recommendation.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèle Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Under rule 90 of the Committee's rules of procedure, Mr. Maxwell Yalden did not participate in the Committee's consideration of the case.

The text of a separate opinion by Committee members Ms. Christine Chanet, Mr. Glèlè Ahanhanzo, Mr. Ahmed Tawfik Khalil and Mr. Rajsoomer Lallah is appended to the present document.

2.2 In July 1989, the author complained to the Ontario Human Rights Commission, alleging that his right to equal treatment with respect to employment without discrimination and harassment had been infringed because of his race, ethnic origin, creed and association, in contravention of the Ontario Human Rights Code, 1981 (henceforth "the Ontario Code").[1] He alleged that certain members of his faculty had come to view him as anti-Semitic, and that his political opinions at the relevant time that Israel could be criticized for not doing more to resolve the Palestinian question, together with other facts, including his race, ethnic origin and religion, became an issue which adversely affected his right to equal treatment in employment, and specifically in his application for promotion to full professor. Between December 1989 and May 1993, the Commission investigated the complaint.

2.3 The Commission rejected the author's complaint on 29 August 1994, finding that: (i) while the evidence indicated that his application for promotion to Full Professor did not receive a fair and timely evaluation, the irregularities in the process did not appear to be related to any prohibited ground of discrimination; and (ii) while the evidence indicated that he might have been differently treated, there was insufficient evidence to indicate that this was a result of his creed rather than his political beliefs, the latter not being a prohibited ground of discrimination under the Ontario Code. The Commission decided not to request the appointment of a Board of Inquiry and dismissed the complaint. The author requested reconsideration of the Commission's decision.

2.4 On 2 May 1995, the Commission upheld its original decision, holding that political belief is not included in the meaning of the word "creed", and that whatever differential treatment the author may have received from his employer, York University, was not based on creed or any other prohibited ground of discrimination. The author applied for judicial review of this decision.

2.5 On 19 September 1995, the Commission declared null its decision of 2 May 1995, on the basis that submissions made to it by the author had not been taken into account. On 29 November 1995, the Commission released its second decision on reconsideration, again upholding the original decision. It again held that "political belief" is not included in the meaning of the word "creed", and that whatever differential treatment the author may have received, it was not based on creed or any other prohibited ground of discrimination. There was thus insufficient evidence to warrant a reversal of the original decision.

2.6 The author applied to the Divisional Court for judicial review of the interpretation of the word "creed" in the Ontario Code as a matter of statutory construction, as well as of the constitutional issue concerning the omission of "political opinion" from the Ontario Code as a prohibited ground of discrimination. On 16 April 1997, the Court dismissed the application, on the basis that "creed" did not encompass "political opinion", and that the omission of "political opinion" from the Ontario Code did not violate the equality provision of the Canadian Charter of Fundamental Rights and Freedoms (henceforth "the Charter").[2] The author appealed to the Court of Appeal for Ontario.

2.7 On 28 June 1999, the Court of Appeal dismissed the appeal. It held that the author's personal opinion on the "single issue of the relationship between Palestinians and Israel" did not amount to a "creed" for purposes of the Ontario Code. On the facts of the case, the Court also declined to add on constitutional grounds a new ground of discrimination, namely political opinion, analogous to those enumerated in section 5 (1) of the Ontario Code. On 3 May 2000, the Supreme Court refused the author's application for leave to appeal.

The complaint

3.1 The author claims to be a victim of violations of article 26, and of articles 2, paragraphs 1 and 2, 19, paragraph 1, and 50 taken in conjunction with article 26 of the Covenant. His principal contention is that the State party has failed to protect against discrimination on the basis of political opinion, which is specifically enumerated in article 26. The author makes three subsidiary arguments.

3.2 Firstly, the omission of "political opinion" from the enumerated grounds in the Ontario Code violates the provisions of the Covenant invoked. He argues that the inclusion of this ground in the human rights legislation of seven other provinces and territories in the State party highlights the absence of such a ground under the Ontario Code and thus discloses an additional violation of article 50 of the Covenant. The author refers to the Committee's concluding observations in 1999 on the State party's fourth periodic report under the Covenant, where it was "concerned at the inadequacy of remedies for violations of articles 2, 3 and 26" and "recommend[ed] that the relevant human rights legislation be amended so as to guarantee access to a competent tribunal and to an effective remedy in all cases of discrimination".[3]

3.3 Secondly, the author contends that fundamental errors of law were made in the resolution of his claim by the Commission and the domestic courts, in violation of article 26. At the level of the Commission, the author argues that the decision was without jurisdiction, that it disregarded the Ontario Code's preamble and international human rights law, that its interpretation of "creed" was unduly narrow, that it failed properly to take into account the intersection of political opinion, race and religion in his case, and that it failed to draw an inference of discrimination.

3.4 At the level of the Divisional Court, the author contends that fundamental errors of law were made (i) in its failure to read the ground of "political opinion" into the Ontario Code and in requiring him to be a member of a "discrete and insular minority", (ii) in its rejection of the contention that political and religious commitments may be so aligned as to constitute "creed", and (iii) in its holding that "creed" requires an element of religious belief. At the level of the Court of Appeal, the author argues that the fundamental errors of law committed were an improper failure to apply a binding prior decision, allegedly mistaken findings of fact, an incorrect *Charter* analysis, and an overly narrow interpretation of "creed" as not covering political opinion. Finally, the author attacks the Supreme Court's failure to grant leave to appeal, on the basis that the questions presented novel and fundamental issues. He views the denial as inconsistent with the Court's criteria for leave and negating the "equal and effective protection against discrimination" guaranteed him by article 26.

3.5 In addition, the author makes a series of claims as to alleged enforcement problems of human rights law in Ontario. He argues that delay is a serious problem and that "the many roles of the Commission, especially in assigning the same officer to investigate a complaint and to attempt a settlement, give rise to problems of conflict of interest, and could lead to coercion." He contends that the referral of between 2-4 per cent of complaints to a board of inquiry for hearing deprives complainants of an effective remedy. He refers to under funding and organizational problems at the Ontario Commission.

The State party's submissions on the admissibility and merits of the communication

4.1 By submission of 21 December 2001, the State party challenged the admissibility and merits of the communication, on the grounds that no violation of the Covenant was substantiated. As to the allegation that the Ontario Code does not include "political opinion" as a prohibited ground of discrimination, the State party refers to the Court of Appeal's findings that even considering the matter in a light most favourable to the author, there was no evidence that the University had discriminated against him on the basis of his political belief. The Court concluded: "There is nothing on the record to suggest that his political beliefs disentitled him to consideration for advancement in the Department of Economics." The State party contends that there is no evidence in any of the impugned decisions of the university, the Commission or the courts that the author was treated differently because of his political beliefs. Nor is there evidence that the Commission would have viewed the evidence as warranting an inquiry if "creed" were to include "political belief". In the light of these evidentiary findings, the claim concerning the Ontario Code is an abstract challenge without factual foundation.[4]

4.2 The State party rejects the author's allegations that fundamental errors of law were made, characterizing these as contentions that Canadian law had been misinterpreted by Canadian courts. It refers to the Committee's constant jurisprudence that it does not substitute its views on the interpretation of domestic law for those of national courts. The author's arguments were fully reviewed and dismissed by three tiers of the Canadian court system, with no basis to support a claim that their interpretation of the law was arbitrary or amounted to a denial of justice.

4.3 As to the claims relating to "enforcement problems" in Ontario, the State party points out that much of the documentary evidence submitted by the author related to the federal Human Rights Commission, a distinct body to the Ontario Commission, which was uninvolved in the case. The material submitted concerning the Ontario Commission is nearly 10 years old and does not represent a current picture of its operations. The State party refers to the Commission's annual report for 2000-2001, showing considerable progress in case management, timeliness of complaint handling, promotion of human rights and public education. For the fifth year, the Commission closed more cases than it opened, and the average age of a complaint was 10 months. Average overall processing time for a complaint was 15 months.

4.4 The Commission's investigations were free, and cases are referred to a board of inquiry if a settlement is not possible. Such a board has broad remedial powers, including monetary awards, and the decisions can be judicially reviewed. In 1999-2000, 68 per cent of 1,700 complaints made were resolved at voluntary mediation with the parties' input. Seventy per cent of complainants considered their claims properly addressed, 78 per cent considered the process fair and 87 per cent indicated they would use it again.

4.5 The State party denies that the omission of "political opinion" from the Ontario Code as a ground of prohibited discrimination violates the Covenant. It contends that States parties may choose the method of implementing their obligations, and that domestic legislation need not exactly mirror them. Freedom of expression, which includes freedom of political opinion and belief, is constitutionally guaranteed by section 2 of the federal Charter, as well as the *Public Service Act* with respect to public servants.

4.6 Finally, with respect to the claim under article 2, the State party refers to the Committee's constant jurisprudence that this article is of accessory nature only. In the absence of a violation of any other right, which the author has not made out, no separate issue thus arises under article 2.

Comments by the author on the State party's submissions

5.1 By letter of 12 April 2002, the author commented on the State party's submissions, rejecting the State party's characterization of his complaint as unsubstantiated, in general, and the Court of Appeals' findings, in particular. He argues that recent attempts on his part to secure before the courts the production of additional relevant documents from the Commission have been rebuffed.[5] He argues that the "plain meaning" of the Commission's decisions is that there had been differential treatment, but that jurisdiction was declined as "political belief" was not covered by the Ontario Code. The author argues that the Commission's public record of the case is insufficiently complete, and that in any event does not fairly reflect the evidence. The author regards the Court of Appeals' evidentiary findings in his case as "unwarranted and highly inappropriate", and not based on the whole record. The author goes on to seek to distinguish the case law relied on by the State party from his case.

5.2 The author argues, with reference to the Committee's approach to burden of proof, that it was incumbent on the State party to provide to the Committee "the entire investigative record, including all witness statements, legal opinions, and evaluations of documentary evidence by Commission staff and their notes of interviewing witnesses" in order to enable it to draw proper conclusions. He also invites the Committee to draw inferences from allegedly systematic practices of the Ontario Commission being "wholesale rejection of human rights complaints on the basis of inaccurate accounts of the events and facts and spurious arguments and considerations made 'behind closed doors'".

5.3 On the omission of "political opinion" from the Ontario Code, the author repeats his argument that the failure to list this ground is a manifest violation of article 26, where the State party has failed in its obligation to implement its obligation. He maintains that his criticisms on the interpretation of law by the courts are "serious, detailed and sustained", and refers to certain public criticism of the Court of Appeal's decision.

5.4 The author maintains his claims of "enforcement problems" in connection with article 2, as victims of discrimination in Ontario cannot bring a court action for discrimination but must file a complaint with the Commission. He claims that the unsatisfactory situation at the Commission he portrayed in his communication was that occurring at the time his complaint was considered by the Commission. Indeed, he argues that "same or similar enforcement problems of human rights legislation in Ontario are continuing and increasing". He also argues that the procedures are ineffective as legal costs make them prohibitively expensive. He argues that lodging and pursuing a complaint without a lawyer is "not a practical option", that legal aid is not available for complaints, that some costs awards by the courts are "unreasonable and could be punitive", and that deduction of legal costs for income tax purposes is not allowed. He further argues that the absence of a Commission facility of interim measures - which he wished to invoke following "escalating acts of reprisals" following filing of his complaint - is a violation of article 2, taken in conjunction with articles 19 and 26.

5.5 As to the State party's argument that section 3 of the *Charter* protects freedom of opinion and expression, the author argues that the Court of Appeal erred in holding that this ground need not be read into the Ontario Code as it was already protected in the Charter. He argues however that the Charter only protects against State action, and not that of entities such as universities. He also argues that the *Charter* protection is incomplete as it is expressed as being subject to reasonable limits, as shown by the alleged invocation thereof "by Jewish groups in many reported and unreported cases". He also argues that the *Public Service Act* does not apply to universities. As a result, the author claims he did not enjoy protection against private sector discrimination on the grounds of political opinion. He goes on to claim that the judge delivering the Court of Appeal's judgement "committed fundamental errors of law", thus bringing into question "the credibility of his entire legal reasoning".

5.6 The author argues that the evidentiary threshold for a claim under article 19 is lower than 26, and is also met in his case. He contends that the proper test is whether there is a restrictive effect on political opinion through its omission in the Ontario Code. As the result is an absence of protection against private sector discrimination on this ground, he claims a straightforward case is made out. In this case, he accordingly submits: "The author was punished in his employment by some of his Israeli and Jewish colleagues at York University for holding and expressing particular opinions with which they did not agree. The employer York University failed him. The Ontario Human Rights Commission refused to protect him on jurisdictional grounds. The domestic courts agreed with the Commission."

5.7 As a result of the foregoing, the author seeks declarations of violations of the Covenant, compensation for legal costs and appropriate compensation, including for lost salary.

Subsequent submissions of the parties

6.1 By letter of 31 July 2002, the author provided a first instance decision of the Prince Edward Island Supreme Court holding that political belief was an "analogous" prohibited ground of discrimination and should be fully available in provincial human rights legislation.[6]

6.2 By note verbale of 5 December 2002, the State party made additional submissions, arguing that the author's response made new claims not in the original submission, contained many anonymous or individual opinions which should not be given weight and continued in large part to challenge the interpretation of domestic law. The State party argues that after having received its submissions, the author then made his application to the Ontario Superior Court (see paragraph 5.1) to secure evidence to fill his "evidentiary gap" before the Committee. He did not bring these proceedings before his original case was heard, and thus should not be able - on principles of failure to exhaust domestic remedies - to argue that the court's original decisions were wrong. Nor, at the time, did he challenge the sufficiency of the record before the courts. In any event, his new application has not been dismissed but only stayed in order to permit him to make a proper application under the *Freedom of Information and Privacy Act* which sets up a compulsory production process safeguarding third party interests. Moreover, the documents sought are irrelevant to the issues before the Committee.

6.3 The State party emphasizes that his challenge on the *Charter's* protection - upon which the Supreme Court has yet to be presented with the proper concrete circumstances enabling it to pronounce - is hypothetical and abstract. The university senate made its decision on the author's application for full professorship without consideration of the two impugned letters or his political belief. There is no contrary evidence.

6.4 The State party rejects any accusation of bias against the judge delivering the judgement of the Court of Appeal, contending that all applicable ethical principles were followed. It also states that the author at no point raised this issue before the domestic courts or the Canadian Judicial Council. As to the "reprisals" alleged by the author, the State party argues that the letter provided is a letter from the university indicating that the author refused to teach a course assigned to him as part of his normal teaching load. The State party has no knowledge of contractual disputes with the university, not a part of government, and submits these are of no relevance to the case. The State party rejects criticisms of the Ontario system of human rights adjudication, referring to commentators' praise of its strengths. Finally, the State party states that the Prince Edward Island decision is under appeal, and points out that the court referred to the finding in the author's case that "there was no evidence which showed his human dignity was even engaged, much less violated, or that his political views disentitled him to consideration for promotion".

6.5 By letter of 17 February 2003, the author responded, claiming that his motion for production of documents was not related to the substance of his claim before the Committee. In any case, he contends that pursuing his application under the Act would be unreasonably prolonged and would not be effective as the Commission seeks to rely on exemptions. He argues that as there were only questions of law before the appellate courts, he did not make arguments on sufficiency of facts. He goes on to refer to *Pezoldova v. The Czech Republic*[7] as an instance where the Committee reviewed the domestic courts' decisions, and invites the Committee to do so in his case.

6.6 The author contends that his case also raises issues under the first sentence of article 14, paragraph 1, and article 14, paragraph 3 (c), as the domestic courts' evaluations were manifestly arbitrary and amounted to a denial of justice, as remedies were ineffective, as the Ontario Commission refused to produce evidence and delays were undue. The author argues that the "reprisals" complaint is part of the evidence produced to show the ineffectiveness of domestic remedies, rather than being a substantive claim. Finally, he supports the more expansive reasoning of the Prince Edward Island court, in contrast to the Court of Appeal in his own case, and argues that in any event the fact of appeal does not justify Ontario's violation of his rights.

6.7 By further letter of 17 November 2003, the author supplies three decisions of provincial courts endorsing the holding of the Divisional Court in his case concerning the fact-finding expertise of human rights commissions and the appropriate level of deference.

Issues and proceedings before the Committee

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

7.2 As to the claim under article 14, paragraphs 1 and 3 (c), of the Covenant, the Committee observes that this issue was first raised in the author's penultimate supplementary submission to the Committee, and accordingly did not form part of the arguments which the State party's submissions were requested as to the admissibility and merits thereof. The author has not demonstrated why this claim could not have been raised at an earlier stage of the pleadings. In the Committee's view, it would thus be an abuse of process for this claim to be addressed and it is inadmissible under article 3 of the Optional Protocol.

7.3 Concerning the claim under article 50 of the Covenant, the Committee recalls that a substantive violation of the Covenant by a provincial authority engages the State party's international responsibility to the same degree as an act of its federal authorities. The Committee refers, however, to its constant jurisprudence that it is only with respect to articles in Part III of the Covenant, interpreted as appropriate in the light of the other provisions of the Covenant, that an individual communication may be presented to it. Accordingly, article 50 of the Covenant, by itself, cannot give rise to a free-standing claim that is independent of a substantive violation of the Covenant. In the Committee's view, therefore, this claim under article 50 is subsumed by the author's arguments on the substantive Covenant articles and is by itself inadmissible, for incompatibility with the provisions of the Covenant, under article 3 of the Covenant.

7.4 Turning to the major claim that the omission of political belief from the enumerated grounds of prohibited discrimination in the Ontario Code violates the Covenant, the Committee observes that an absence of protection against discrimination on this ground does raise issues under the Covenant.[8] Moreover, the exclusion in the Ontario Code of political opinion as a prohibited basis of discrimination suggests that the State party may have failed to ensure that, in an appropriate case, there would be a remedy available to a victim of discrimination on political grounds in the field of employment. The Committee observes however that the Court of Appeal, having found that the author's views did not amount to a protected "creed", went on to conclude that even considering the matter in the light most favourable to the author, there was nothing on the record to suggest that the author's political beliefs had disentitled him to consideration for advancement in the Department of Economics. It is not for the Committee to substitute its views for the judgement of the domestic courts on the evaluation of facts and evidence in a case, unless the evaluation is manifestly arbitrary or amounts to a denial of justice. If a particular conclusion of fact is one that is reasonably available to a trier of fact on the basis of the evidence before it, ipso facto a showing of manifest arbitrariness or a denial of justice will not have been made out. In the Committee's view, the author has failed to discharge the burden of showing that the factual assessment of the domestic courts was thus flawed. In the light of this conclusion, the claim under article 26 concerning the absence of protection of political belief in the Ontario Code is rendered hypothetical. The claim is accordingly unsubstantiated and inadmissible under article 2 of the Optional Protocol.

7.5 As to the claims that the Commission, the Divisional Court at first instance and on appeal, and the Supreme Court committed fundamental errors of law, the Committee recalls its constant jurisprudence that the interpretation of domestic law is a matter for the domestic courts, unless the interpretation is manifestly arbitrary or amounts to a denial of justice. In the Committee's view, the author has not shown the exceptional circumstances necessary to make out such a claim. Accordingly, these claims are inadmissible, for lack of sufficient substantiation for purposes of admissibility, under article 2 of the Optional Protocol.

7.6 As to the general claims that the enforcement machinery of the Ontario scheme of human rights protection is flawed and fails to provide an effective remedy, the Committee recalls its constant jurisprudence that, in order to bring a claim, an individual must be personally and directly affected by the violations claimed. Accordingly, to the extent that the author argues that the scheme as a whole is in breach of the Covenant, this claim amounts to an *actio popularis* reaching beyond the circumstances of the author's own case. It is therefore inadmissible under article 1 of the Optional Protocol.

8. The Committee therefore decides:

(a) That the communication is inadmissible under articles 1, 2 and 3 of the Optional Protocol;

(b) That this decision shall be communicated to the author and to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] Section 5 (1) of the Ontario Code provides: "Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or handicap."

[2] Section 15 (1) of the Charter provides: "Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour religion, sex, age or mental or physical disability."

[3] A/54/40, at para. 231.

[4] The State party refers to *Aumeeruddy-Cziffra et al. v. Mauritius*, case No. 35/1978, Views adopted on 9 April 1981, *Disabled and Handicapped Persons in Italy v. Italy*, case No. 163/1984, decision adopted on 10 April 1984, and *J.H. v. Canada*, case No. 187/1985, decision adopted on 12 April 1985.

[5] Stay of Application, dated 20 March 2002, *Jazairi v. Ontario Human Rights Commission*, Ontario Superior Court of Justice (Wilkins J.).

[6] *Condon v. Prince Edward Island* [2002] P.E.I.J. No. 56.

[7] Case No. 757/1997, Views adopted on 25 October 2002.

[8] See *Love et al. v. Australia*, case No. 983/2001, Views adopted on 25 March 2003.

APPENDIX

Individual opinion of Committee members Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Ahmed Tawfik Khalil and Mr. Rajsoomer Lallah (dissenting)

1. We agree, as the majority in the Committee does in the first two sentences in paragraph 7.4 of the Views, that the absence of protection from discrimination on the ground of political opinion in the Ontario Human Rights Code raises an issue under article 26 of the Covenant.

2. The majority in the Committee then goes on to conclude that, in the light of the judgement of Ontario Court of Appeal, there was nothing to suggest that the author's political beliefs had disentitled him to consideration for advancement in the Department of Economics in which he held tenure as associate professor. We are quite unable to agree with the majority view in the Committee for a number of reasons.

3. Firstly, the conclusion of the majority of the Committee was clearly based, in our view, on an unfortunate confusion between a judicial review (an inherently limited administrative law recourse based on a mere application supported by affidavit evidence) and an ordinary action where the judgement is based on the evidence of witnesses, who are heard in court and are subject to cross-examination, from which the Court makes proper findings of fact. A judicial review does not purport to review the facts and is an extraordinary remedy in respect of which the Court has a discretion to grant or not to grant the remedy. This is well explained in the judgement of the Court of Appeal itself at [42] of the judgement quoting the following from Blake on Administrative Law in Canada 2nd ed. 1997:

> "On judicial review there is no right to a remedy even if all the necessary criteria are met. A court may choose not to grant a remedy to an applicant who is otherwise entitled."

It is to be noted that the proceedings before the Court of Appeal concerned the question whether the divisional court should or should not grant an order, by way of judicial review, against the Commission requiring it to appoint a Board of Enquiry pursuant to the Human Rights Code. The purpose of a Board of Enquiry must presumably be to enquire whether the complaint was substantiated or not. In this connection, the State party explains, as appears from paragraphs 4.4 of the Committee's Views, that the Commission's investigations were free and cases are referred to a Board of Enquiry if a settlement is not possible.

4. Secondly, the question of admissibility before the Committee must be determined not in the light of the complaint as made before a domestic court, but in the light of the complaint laid before the Committee and this complaint is well laid out in paragraphs 2.1 to 3.5 in the Committee's Views. The facts averred manifestly show that the author has sufficiently substantiated his claim for the purposes of admissibility.

5. Thirdly, as appears from paragraph 2.3 of the Views, the allegations of the author, incidentally confirmed to be substantiated by the Court of Appeal in paragraph [15], setting out the Commission's conclusions, is to the effect that the Commission did find that (i) while the evidence indicated that the author's application for promotion to full professorship did not receive a fair and timely evaluation, the irregularities committed did not appear to be related to

any prohibited ground of discrimination and (ii) while the evidence indicated that the author might have been differently treated, there was insufficient evidence to indicate that this was the result of his creed rather than his political beliefs, the latter not being a prohibited ground of discrimination under the Ontario Code.

6. So what do we have? The law in Ontario does not hold political opinion to be a prohibited ground of discrimination. This constitutes a violation of article 26 of the Covenant and the Commission felt unable to interpret creed as including political opinion with the result that it was unable to grant the remedy which the author was seeking, that is to say, the appointment of a Board of Enquiry by the Commission.

7. Much can be said about where the burden of proof lies in situations where an employee claims that he has been discriminated against on a ground prohibited by article 26 the Covenant. It seems to us that the author must at least substantiate in some measure his complaint as the author has undoubtedly done in this case. However, it is for the State party to disclose all the facts to show not merely negatively by a mere statement that the different treatment of the author was not due to discrimination on the ground of his political opinion but positively that he was found, for example, to be unfit for a specified reason, or that the record of his performance did not justify promotion at least at that stage, or for other justifiable reasons.

8. For the above reasons, we conclude that the author's complaint is, in the first place, admissible and that, secondly, he has been deprived of protection against discrimination on the ground of political opinion as guaranteed under article 26 of the Covenant, because the Ontario Code does not grant him such protection. The Ontario Human Rights Commission and the Court could not, therefore, give him a remedy not provided by the Ontario Code. In accordance with article 3, paragraph 2 (a), of the Covenant, the State party should, in our view, grant to the author the remedy which he has been seeking since 1 July 1989.

(*Signed*): Christine Chanet

(*Signed*): Maurice Glèlè Ahanhanzo

(*Signed*): Ahmed Tawfik Khalil

(*Signed*): Rajsoomer Lallah

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

H. Communication No. 967/2001, *Ostroukhov v. The Russian Federation* (Decision adopted on 31 March 2005, eighty-third session)*

Submitted by: Valentin Ostroukhov, (represented by counsel, Mrs. Ledeneva, Mrs. Voskobitova, and Mrs. K. Moskalenko, the Moscow International Protection Centre)

Alleged victim: The author

State party: Russian Federation

Date of communication: 27 April 1999

Subject matter: New legal qualification of illegal possession of drugs

Procedural issues: Non substantiation of claim for purposes of admissibility

Substantive issue: Retroactive application of lighter sentence after legislative change articles of the Covenant: 14, paragraph 1, and 15, paragraph 1

Article of the Optional Protocol: 2

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 31 March 2005,

Adopts the following:

Decision on admissibility

1. The author of the communication is Mr. Valentin Ostroukhov, a Russian national born in 1977, who at the time of submission of the communication was serving a prison sentence in Komi Republic (Russian Federation). He claims to be a victim of violations by the Russian Federation of articles 14, paragraph 1, and 15, paragraph 1, of the Covenant. He is represented by counsel.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Ahmed Tawfik Khalil, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Factual background

2.1 On 27 August 1996, the author purchased 10 grams of marijuana from an unknown person, allegedly out of curiosity. Shortly afterwards, he was questioned by a police patrol near his home, and the drugs were discovered. He was arrested and placed in preliminary detention. On 10 November 1997, the Tagansky Inter-municipal Court of Moscow found him guilty of illegal purchase and storage of drugs without intention to sell, and sentenced him to one year and six months' imprisonment under article 224 (3) of the Criminal Code of RSFSR, in force at the time when the crime was committed.[1]

2.2 The author notes that at the time of the crime - 27 August 1996 - the old Criminal Code was still in force and under its provisions the illegal purchase and storage of "small" amounts of marijuana constituted a crime. According to him, the Summary Table of the Drug Control Standing Committee of 17 April 1995 stipulated that 10 grams of marijuana was a "small" amount.

2.3 The author points out that during the time of the investigation and at the time of the court proceedings, a new Criminal Code had entered into force (on 1 January 1997). According to its article 228, criminal responsibility is engaged only in the event of the illegal purchase and storage of drugs in "large" or "very large" amounts, and, in the author's opinion, the possession of "small" amounts of drugs was thus decriminalized.[2] By virtue of article 10 of the new Criminal Code, this decriminalization had to apply retroactively to persons who had committed similar crimes before the entry into force of the new Code. In spite of this, the Court convicted him on 10 November 1997.

2.4 Mr. Ostroukhov appealed against the court of first instance judgement to the Moscow City Court, requesting that the judgement be quashed and that the case be dismissed. In the appeal, he referred to article 228 of the new Criminal Code which decriminalized the possession of "small" amounts of marijuana. On 11 December 1997, the Moscow City Court upheld the judgement of 10 November 1997.

2.5 The author then appealed to the President of the Moscow City Court, with a request under the supervisory procedure (*nadzor*). On 20 January 1998, the President of the Moscow City Court explained that the author's complaint was groundless, because the sanction under article 228 of the new Criminal Code for the possession of 10 grams of marijuana without intention to sell was in fact heavier than the sanction under article 224 of the former Criminal Code. The author filed several more complaints with the Office of the Prosecutor General and with the Supreme Court. The Chairman of the Supreme Court examined his case and concluded that it had transpired from the Summary Table of the Standing Committee on Drug Control of 1 August 1995 and its annexed List No. 1 ("On Amounts of Drugs that Can be Considered Small, Large and Very Large") of 4 June 1997, that the purchase and storage of 10 grams of marijuana constituted a crime both at the time of its commission, as well as under the new Criminal Code.

2.6 According to the author, the new Summary Table of the Standing Committee on Drug Control of 4 June 1997 provided that 10 grams of marijuana constitute a "large" amount, and was applied for the qualification of the offence he committed on 27 August 1996.

The claim

3. The author alleges that he is a victim of violations by the Russian Federation of his rights under articles 14, paragraph 1, and 15, paragraph 1, of the Covenant. He states that in 1996 he was charged with possession of a "small quantity" of marijuana, and in November 1997 was convicted and sentenced to a term of imprisonment. He alleges that his conviction was unlawful, because on 1 January 1997, a new Criminal Code had entered into force, which decriminalized the possession of small quantities of marijuana; under Russian law, legislation which decriminalizes an offence should be applied retrospectively.

The State party's observations

4.1 By note of 31 July 2001, the State party explained that the Office of the Procurator-General had examined the author's criminal case under the supervisory procedure. It affirms that author's counsel based his defence arguments on the Summary Table of the Standing Committee on Drug Control of 1 August 1995, according to which 10 grams of dried marijuana constituted "a small quantity" of narcotics, and accordingly did not justify the institution of criminal proceedings against the author under the Criminal Code then in force.

4.2 According to the State party, the above arguments were not persuasive, because the quantities of narcotics mentioned in the Standing Committee's summary tables of 1 August 1995 and 4 June 1997 are at best mere scientific recommendations for experts. The Standing Committee's findings have no legal force, and the rule that criminal law should not have retroactive effect does not apply to them. According to the State party, it is exclusively for the courts to decide, in the light of all the circumstances, whether a given amount of narcotics is to be qualified as constituting a "small", "large" or "exceptionally large" amount.

Author's comments on the State party's observations

5. The author commented on the State party's observations by letter of 14 November 2002. He argues that the Summary Tables of the Standing Committee on Drug Control of 1 August 1995 and of 4 June 1997 constitute, de facto, a source of law, because in any event they were used to qualify his acts in legal terms, and, according to him, they do not constitute mere scientific recommendations.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that the same matter is not being examined under any other international procedure of investigation and settlement, and that available domestic remedies have been exhausted. It thus considers that the conditions set forth in paragraphs 2 (a) and (b) of article 5 of the Optional Protocol have been met.

6.3 The Committee has noted the author's claim that his rights under articles 14, paragraph 1 and 15, paragraph 1, were violated since he was convicted unlawfully by the Tagansky Inter-municipal Court of Moscow on 10 November 1997, under the provisions of the Criminal Code of 1960, for possession of 10 grams of marijuana (a quantity qualified at this time as "small"), notwithstanding that on 1 January 1997, the State party's new Criminal Code had entered into force, and that according to its provisions, the purchase and storage of "small" amounts of drugs was decriminalized. The Committee notes however that the Tagansky Inter-municipal Court of Moscow addressed the issue and based its judgement of 10 November 1997 on the old Criminal Code, arguing that the sanction for the illegal purchase and storage of 10 grams of marijuana was lighter than the sanction under the new Criminal Code. In appeal, the Moscow City Court determined that the possession of such an amount of drugs was a crime both under the old and the new Code.

6.4 In essence, the author's main argument relates to the legal qualification of the purchase of the above amount of marijuana, considered as "small" under the law in force in 1996, and "large" under the new Criminal Code of 1997. According to the author, the new Criminal Code decriminalized the purchase of "small" amounts of marijuana and therefore he should be acquitted, since the amount he possessed was "small" according to the Summary Table of the Drug Control Standing Committee of 17 April 1995. The Committee has noted that this argument was addressed by the Courts and was found to be groundless. The Committee notes that the author's claim relates, in its nature, to an evaluation of facts and evidence and to interpretation of domestic legislation. It reiterates its jurisprudence that the evaluation of facts and evidence and interpretation of domestic legislation is in principle a matter to be decided by the courts of States parties, unless the evaluation of facts and evidence was clearly arbitrary or amounted to a denial of justice.[3] As the author has provided no evidence to show that the appellate courts' decisions suffered from such defects, the Committee considers this claim as unsubstantiated for purposes of admissibility and thus inadmissible under article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

(b) That the present decision shall be communicated to the State party and to the author, for information.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] Article 224 (3) of the Criminal Code of the Russian Soviet Federative Socialist Republic reads as follow: "*The illegal manufacturing, acquisition, storing, transport or sending of narcotic substances without intention to sell - is punished by a deprivation of liberty up to three years or by correctional labour up to two years.*"

[2] According to article 228 of the new criminal Code, "*Illegal Manufacture, Acquisition, Keeping, Carriage, Sending or Sale of Narcotic Means or Psychotropic Substances*

> *1. The illegal acquisition or keeping without the purpose of sale of narcotic means or psychotropic substances on a large scale shall be punished by deprivation of freedom for a term of up to three years.*"

[3] See, for example, communication No. 842/1998, *Sergei Romanov v. Ukraine*, inadmissibility decision adopted on 30 October 2003.

I. Communication No. 969/2001, *da Silva Queiroz v. Portugal* (Decision adopted on 26 July 2005, eighty-fourth session)*

Submitted by:	Abel da Silva Queiroz et al. (represented by counsel, João Pedro Gonçalves Gomes and Rui Falcão de Campos)
Alleged victims:	The authors
State party:	Portugal
Date of communication:	16 April 2000 (date of initial submission)
Subject matter:	Loss of property in Angola by Portuguese citizens at the time of decolonization by Portugal and non-compensation for losses constituting a possible case of discrimination
Procedural issues:	Admissibility *ratione temporis* - continuing effect
Substantive issues:	Right to own property; right to compensation; discrimination
Articles of the Covenant:	26
Articles of the Optional Protocol:	5, paragraph 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 26 July 2005,

Adopts the following:

Decision on admissibility

1.1 The authors are Portuguese citizens who lost their property in Angola at the time of decolonization by Portugal and have received no compensation for the loss. The authors claim to be victims of a violation by Portugal of article 26 of the International Covenant on Civil and Political Rights. They are represented by counsel.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

An individual opinion signed by Committee member Ms. Ruth Wedgwood is appended to the present document.

1.2 Portugal has been a party to the International Covenant on Civil and Political Rights since 15 September 1978 and a party to the Optional Protocol since 3 August 1983.

Facts as presented by the authors

2.1 The authors, a group of Portuguese citizens forming the "Association of the Dispossessed of Angola", lost all their property during the decolonization of Angola, which was a Portuguese colony until it acquired independence on 11 November 1975. They have received no compensation.

2.2 On 26 October 1977, Portugal promulgated Act No. 80/77, recognizing the right of Portuguese citizens and foreign nationals whose property on Portuguese metropolitan territory had been expropriated or nationalized during the troubles of 1975 and 1976 to receive compensation.

2.3 Article 40 of the Act excludes from its sphere of application property that was situated in the former Portuguese colonies, referring such cases to the legislation of the State in which the expropriated property is situated.[1]

2.4 The authors contend that, as a part of the decolonization process that began in 1974, the Alvor Agreement was signed on 15 January 1975 between Portugal, the National Front for the Liberation of Angola (FNLA), the Popular Movement for the Liberation of Angola (MPLA) and the National Union for the Total Independence of Angola (UNITA). Under the agreement, the State party recognized the Angolan people's right to independence and set out arrangements for the exercise of power during the transitional period, i.e. up to 11 November 1975, the date set for the declaration of independence. The powers of the Angolan Governments known as the transitional Governments, which were made up of representatives of the signatories of the Agreement, included that of ensuring the security of property and individuals. However, the authors claim that most of the property belonging to Portuguese citizens in Angola had to be abandoned owing to poor security, and was seized in particular by the population and armed groups of insurgents. Because of these violations, Portugal abrogated the Alvor Agreement by Decree-Law No. 458-A/75 of 22 August 1975. The authors state that the transitional Governments of Angola authorized the confiscation of certain property by a decree-law of 7 October 1975. Most of the property was subsequently confiscated and nationalized by the State of Angola.

2.5 Although Portugal compensated its nationals for losses suffered in Portuguese territory in 1975 and 1976, Portuguese citizens who were dispossessed in Angola have not been compensated.

The complaint

3.1 The authors consider that Act No. 80/77[2] is discriminatory within the meaning of article 26 of the Covenant, since Portuguese nationals were treated differently with respect to the granting of compensation depending on whether their property was located in Portugal or in the former Portuguese colonies, including Angola.

3.2 The authors consider that Portugal bears responsibility under civil law for the acts that took place in Angola prior to independence. They hold that, during that period, Angola was in law a Portuguese territory, over which the State party had full jurisdiction, including jurisdiction for the application of its legislation (in particular articles 6 and 8 of the 1933 Constitution, which lay down the duty of the State to guarantee respect for rights and liberties and ensure their realization, and the right to the non-confiscation of property). The authors also consider that Portugal is jointly responsible for the material harm suffered by its citizens in Angola after independence, by virtue of the duty of diplomatic protection. In that regard, they point out that the present Portuguese Constitution provides (art. 14) that "Portuguese citizens who are located or reside abroad shall enjoy the protection of the State in the exercise of their rights ...". According to the authors, Portugal's responsibility is also demonstrated by the fact that an allocation is included in the State budget each year to cover compensation arising from the decolonization process. Lastly, the authors hold that the State party's responsibility arises both from the actions described above which it permitted prior to Angola's independence, and from a continuous failure to discharge its duty to provide diplomatic protection since then. The authors' right to compensation is therefore not time-barred, but continuous. It is an acquired right.

3.3 The authors seek reparation for the spoliation of their property in the form of compensation, either directly on the part of Portugal or indirectly on the part of Angola through diplomatic channels.

3.4 The authors consider that they have exhausted domestic remedies, as no recourse to the courts is available to them. As Portuguese legislation does not allow individuals to challenge Act No. 80/77 directly before the Constitutional Court, they report that they lodged their claim with the Ombudsman (*Provedor de Justiça*), who decided on 5 July 1993 not to follow up their complaints. The authors add, in their initial communication, that no judicial appeal may be made against the Ombudsman's decision.

Observations by the State party

4.1 In its observations dated 18 June 2001, the State party challenges the admissibility of the communication.

4.2 Firstly, the State party considers, on the basis of the Committee's jurisprudence,[3] that the complaint is inadmissible *ratione temporis*, since the authors complain of events that occurred between 1975 and 1976 and of Act No. 80/77, which entered into force on 26 October 1977, whereas Portugal ratified the Optional Protocol on 3 May 1983.[4]

4.3 Secondly, the State party considers, on the basis of the Committee's jurisprudence,[5] that domestic remedies have not been exhausted. In the present case, and on the basis of the jurisprudence of the Supreme Administrative Court of Portugal, it is necessary to consider the issue of the civil liability of the State arising from a legislative or political act.[6] According to the State party, Portuguese law recognizes this form of State liability, but the authors should in this case have instituted proceedings before the ordinary courts.[7] The jurisprudence of the Supreme Court acknowledges this liability for legislative acts, according to the State party.[8] Consequently, according to the State party, it was open to the authors to institute civil proceedings against the State, to seek compensation from the State in the courts of justice and to challenge the constitutionality of the law in those courts. The Public Prosecutor would then immediately have placed the matter before the Constitutional Court, where it would have been considered, as desired by the complainants. They would have been able to pursue their remedy in the ordinary courts, in respect of the matter of compensation. In the present case, the authors had not exhausted such remedies.

4.4 Thirdly, the State party holds that the communication is inadmissible as the matter was submitted to the Human Rights Committee on 16 April 1998, five years after the Ombudsman handed down his decision on 5 July 1993.

4.5 In a note verbale dated 21 September 2001, the State party presents its observations on the merits, which it considers relate to the issue of whether there was discrimination between citizens depending on whether their property was located in Portuguese territory or in territory under Portuguese administration.

4.6 The State party considers that the issue of discrimination is connected with the status of Angola and Portugal in international law.

4.7 According to the State party, without wishing to deny a priori any responsibility which might devolve upon Portugal vis-à-vis its nationals which it has a duty to protect as the country of nationality, the question arises of whether Angola's legal status is the same as that of Portugal, where Portuguese citizens are concerned, and whether Portugal is consequently in a position to grant the same treatment to nationals within Portugal and those who are located in Angola, which was still a Portuguese responsibility at the time of the events. There would be discrimination only if the situation was the same.

4.8 The State party, referring to the jurisprudence of the European Court of Human Rights, explains that, under the concept of discrimination, situations that are the same are treated in the same way, and situations that are different are treated differently.

4.9 The State party holds that the distinction established in Act No. 80/77 is linked not to a particular purpose - that of granting compensation - but to a de facto situation, namely the material, actual and possible exercise of jurisdiction by the Portuguese State in Angola at the time of the events. According to the State party, the concept of jurisdiction is clearly established in international law:

> "The expression 'under their jurisdiction' seems to restrict the number of beneficiaries of the Convention, but it merely establishes the necessary link between the victim of a violation of the Convention and the State party to which this violation may be ascribed. In other words, in order for the Convention to be applicable, it must be possible for the State to recognize the rights guaranteed under the Convention; however, the existence of a stable juridical link such as nationality, residence or domicile is not required, as it is enough for the State to be able to exercise a degree of authority over the person concerned."

4.10 According to the State party, the following questions arise: why, then, should action taken with regard to those dispossessed in Angola be restricted to Portuguese citizens who possessed property there, and not extended to non-Portuguese? And was the Portuguese State in a position to exercise a degree of authority over the property of the persons concerned?

4.11 The State party explains that the genesis of a new State in international terms depends on factors related to actual events rather than to the law. It concludes that, in the present case, there was no discrimination, because the situation was not the same in Portugal and in Angola. According to the State party, Angola, even before decolonization, was a territory that was distinct from Portugal and, under international law, legally ready for separation. It was a potential State. Portugal, on the other hand, is a unitary State only in respect of the Iberian rectangle and the autonomous regions - which do not have colonial status internationally. Hence the State party considers that Portugal is required to protect property only in that territory.

4.12 Similarly, according to the State party, it cannot be asserted that the status of metropolitan territory or colony is conferred by the State. For 50 years it has been conferred by the international community, and this undermines the Portuguese State's jurisdiction over Angola as from the moment when decolonization is in the transitional phase. Besides, according to the State party, from the moment when the status of territories was determined by the international community, such territories were no longer a Portuguese responsibility, and it was for that reason that Portugal moved to decolonize them during the 1970s.

4.13 The State party holds that, even if one must be able to assert that private circumstances must be maintained in the event that a new State is created, the colonizing State cannot guarantee such circumstances when they pass under the de facto jurisdiction of the new State, even if the moment is a moment of transition, and even if the State is still in the process of formation. The protection of such circumstances should fall to the new State, without prejudice, of course, to the provisions, inter alia, of United Nations General Assembly resolution 1314 (XIII) of 12 December 1958 and resolution 1803 (XVII) of 12 December 1962 on "Permanent sovereignty over natural resources". This is confirmed, according to the State party, by the United Nations Declaration of 24 October 1970 on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations and by United Nations General Assembly resolution 1514 (XV) of 14 December 1960 on the granting of independence to colonial countries and peoples.

4.14 The State party concludes that there is no discrimination between Portuguese citizens whose property was located in Portugal and Portuguese citizens whose property was located in Angola at the time of the entry into force of Act No. 80/77, and hence that there was no violation of article 26 of the Covenant by the State party. It adds that, notwithstanding the above-mentioned legal aspects, which demonstrate that the authors' complaint is not justified, Portugal did not abandon the Portuguese citizens who were located in Angola and, as far as it was able, sought to protect them and their property and to secure their reintegration in Portugal.[9]

4.15 Hence it has been established that the State party did not infringe article 26 of the Covenant, nor did it abandon Portuguese citizens located in Angola at the time of decolonization.

4.16 In its observations of 29 December 2004 on the authors' comments of 6 December 2004, the State party again argues that the communication is inadmissible. It emphasizes that to date only the proceedings in the Cascais civil courts have given rise to a Supreme Court ruling. In the State party's view, the question is whether an issue of constitutionality was brought before the Constitutional Court and if so, whether it was relevant. As to the merits, the State party repeats its contention that it is not possible to seek compensation for acts perpetrated outside the State party's jurisdiction.

Comments by the authors

5.1 In a letter dated 28 November 2001, the authors challenge the State party's observations and maintain that domestic remedies have been exhausted. They cite the appeals lodged in Lisbon administrative court on 25 September 1997,[10] in Lisbon civil court on 20 November 1998 and 20 April 2000, in Viseu and Cascais civil court on 2 May 2000 and in Tomar civil court on 3 May 2000. They state that, as of the date of submission of their letter to the Committee, no rulings have been handed down.

5.2 In a letter dated 6 December 2004, the authors state that to date, only the proceedings in the Cascais civil court have given rise to a judgement, namely the ruling by the courts that the authors' right to compensation has lapsed (judgement of the Cascais civil court dated 18 June 2002, upheld by the Appeal Court on 5 May 2003 and by the Supreme Court on 14 May 2004).

The Committee's deliberations concerning admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee ascertained, as it is required to do under article 5, paragraph 2 (a), of the Optional Protocol, that the case was not under examination by another instance of international investigation or settlement.

6.3 The Committee has taken note of the State party's arguments concerning the inadmissibility of the complaint *ratione temporis* and the comments by the authors on this subject.

6.4 In keeping with its jurisprudence,[11] the Committee considers that it cannot consider alleged violations which occurred before the entry into force of the Covenant for the State party, unless the violations complained of continue after the entry into force of the Optional Protocol. The Committee finds that the discrimination arising from Act No. 80/77 of 26 October 1977 occurred before ratification by the State party of the Covenant on 15 September 1978 and of the Optional Protocol on 3 August 1983. The Committee does not consider that the ongoing effects of such discrimination pursuant to the Act constitute violations of the Covenant as such. The communication is therefore inadmissible *ratione temporis*.[12] In such circumstances, it is not necessary for the Committee to pronounce on whether domestic remedies have been exhausted.

7. The Committee therefore decides:

(a) That the communication is inadmissible under article 1 of the Optional Protocol;

(b) That this decision shall be communicated to the State party and the authors.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] The Act limits its applicability to expropriations and nationalizations effected respectively under Decree-Law No. 407-A/75 of 30 July 1975 and agrarian reform legislation adopted from 25 April 1974 onwards (art. 1, para. 2). It expressly excludes certain acts of nationalization undertaken during that period in Portugal (art. 1, para. 4), together with those carried out in Portugal's former colonies (art. 40, para. 1).

[2] Act No. 80/77 of 26 October 1977, whose original title is "*Indemnizações aos ex-titulares de direitos sobre bens nacionalizados ou expropriados*", recognized the right to compensation of Portuguese citizens and foreign nationals whose property on Portuguese territory had been expropriated or nationalized during the troubles of 1975 and 1976.

[3] Communication No. 490/1991 (*A.S. and L.S. v. Australia*) and communication No. 579/1994 (*K Werenbeck v. Australia*).

[4] Portugal ratified the Optional Protocol on 3 August 1983.

[5] Communication No. 427/1990 (*H.H. v. Austria*).

[6] In a ruling dated 17 December 1998, in case No. 43881, the Supreme Administrative Court states that this liability "has passed, with the promulgation of the present Constitution, from the simple sphere of acts of public management, under Decree-Law No. 48051, to that of universal liability under article 22 of the Constitution for all acts or omissions which were committed in the exercise or by virtue of this exercise, and which gave rise to violations of rights, liberties and guarantees, or harm to another person". According to Gomes Canotilho and Vital Moreira (Commentary on the Constitution, third edition), this principle of State liability for harm caused to citizens is one of the inherent principles of the democratic rule of law, as an element of the general right of individuals to compensation for harm caused by others. Hence the liability of the State for harm caused to others goes beyond the simple administrative function and, subject to specific conditions, extends to acts committed in the exercise of the legislative function, the judicial function and even the political or governmental function.

[7] Ruling quoted: "Cases which are not assigned to other courts fall within the competence of the courts of justice."

[8] Ruling of 22 April 1999 in case No. 98B750, ruling of 18 April 1991 in case No. 0811351, and ruling of 10 November 1991 in case No. 082051.

[9] By Decree-Law No. 308-A/75 of 24 July 1975, the State party sought to maintain the nationality of Portuguese nationals returning from the former colonies. It set up the Institute for Support to Returning Nationals under Decree-Law No. 169/75 of 31 March 1975. Moreover, under the Alvor Agreement, Portugal undertook to transfer property or securities belonging to Angola which were outside Angola, while the liberation movements undertook to respect the property and legitimate interests of Portuguese nationals domiciled in Angola. By virtue of a unilateral declaration issued by Portugal under Decree-Law No. 458-A/75 of 22 August 1975, this agreement was suspended owing to the frequent violations committed by the liberation movements.

[10] This appeal did not refer to Act No. 80/77 and its discriminatory nature, which are the subject of the present complaint.

[11] Communication No. 24/1977 (*S. Lovelace v. Canada*), communication No. 196/1985 (*I. Gueye v. France*), communication No. 516/1992 (*J. Simunek et al. v. The Czech Republic*), communication No. 520/1992 (*E. and A.K. v. Hungary*) and communication No. 566/1993 (*Ivan Somers v. Hungary*).

[12] Communication No. 983/2001, *John K. Love et al. v. Australia*, para. 7.3.

APPENDIX

Individual opinion of Committee member Ms. Ruth Wedgwood

The authors complain that their properties in Angola were seized, without compensation, during the transition to independence in 1974 to 1975, and that Portugal has not paid compensation for these actions of the Angolan authorities. This is said to violate a right to equal treatment under article 26 of the Covenant on Civil and Political Rights, because Portugal chose to pay compensation for any expropriations within its European territory during the same period. The claim of unlawful discrimination is maintained even though Portugal's influence and control within Angola in this time period was waning, if not eclipsed.

The Committee has found that this complaint, claiming unlawful discrimination, is inadmissible *ratione temporis*. The Committee notes that Portugal's law on compensation was promulgated in October 1977, nearly six years before Portugal joined the Covenant's Optional Protocol in August 1983.

However, where a violation has "continuing effect", the Committee has at times examined events that predate a state party's accession to the Optional Protocol. It is thus apropos to note the authors' petition would fail on an independent ground, namely, the failure to exhaust local domestic remedies. Litigation before the courts of Portugal is still ongoing, and the authors have not shown that these remedies would be futile.

The authors' petition commingles several theories. One addresses the scope of "diplomatic protection" - does a government have a duty, as well as a right, to champion its citizens' claims against foreign states, and can a government use its discretion in deciding how, and whether, to propound such foreign claims? The second is the assertion that a state party has a duty to provide compensation where such foreign claims are not successful. The third is the claim that Portugal remained legally responsible for property seizures carried out before the formal date of Angola's independence, on 11 November 1975, even though Lisbon may have lost effective control of events in the colony and attempted to protect Portuguese properties through the Alvor Agreement. Each of these questions may interest international lawyers. But their merits, and asserted relationship to article 26 of the Covenant, cannot be addressed in a petition that does not meet the first prerequisite of an admissible communication under the Optional Protocol, namely, the clear exhaustion of local remedies.

(*Signed*): Ruth Wedgwood

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

J. Communication No. 988/2001, *Mariano Gallego v. Spain* (Decision adopted on 3 November 2004, eighty-second session)*

Submitted by:	Mariano Gallego Díaz (represented by counsel)
Alleged victim:	The author
State party:	Spain
Date of communication:	28 October 1999 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 3 November 2004,

Adopts the following:

Decision on admissibility

1. The author of the communication is Mariano Gallego Díaz, a Spanish citizen resident in Switzerland, born on 22 June 1930. He is represented by counsel, Emilio Ginés Santidrián.

The facts as submitted by the author

2.1 The author, a trained engineer, worked in Spain from 1 March 1958 until 10 September 1982, when he emigrated to Switzerland. Throughout that period, the author paid contributions to the Spanish social security scheme on the maximum contribution basis for his occupational group. During his residence in Switzerland, the author paid contributions to the Swiss social security scheme until he retired in 1995. On retirement the author, pursuant to the Agreement between Spain and Switzerland on social security of 1969 and the Additional Agreement thereto of 1982, was entitled to retirement pensions under the Spanish and Swiss social security schemes respectively. By application of the pro rata temporis rule, 70 per cent of the pension is payable by the Spanish system and the rest by the Swiss system.[1]

2.2 In order to determine the amount of the Spanish pension, the Spanish authorities, pursuant to article 14 of the bilateral Additional Agreement cited,[2] used the minimum contribution basis applicable in Spain to workers in the same profession. The author, who disputed the calculation, decided to initiate legal proceedings, since he considered that the basis applied to him should not correspond to the minimum contributions for his group. Other factors should also be taken into account, in particular the fact that until the year in which he emigrated he had paid contributions in Spain on the maximum contribution basis for his group.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

2.3 On 26 May 1997 Madrid Social Court No. 3 rejected his application. The judgement was appealed before the Social Chamber of the Madrid High Court, which confirmed the judgement at first instance on 7 April 1998. The author filed an appeal with the Constitutional Court, which was rejected on 25 January 1999.

The complaint

3. The author alleges a violation of article 26 of the Covenant, since in the case of Spanish workers who emigrated to other countries, for example Germany, their pension was not calculated on the minimum contribution basis, and thus was bigger. The bilateral agreements between Spain and Switzerland and between Spain and Germany respectively gave rise to unfair and unequal treatment, since persons who had contributed to the Spanish social security system for the same time and in the same amount were treated differently, depending on whether they had emigrated to Switzerland or to Germany.

Observations by the State party

Observations on admissibility

4.1 On 17 September 2001 the State party submitted its observations on the admissibility of the communication, considering that it should be declared inadmissible.

4.2 The State party maintains that if the author wishes to raise before the Committee his disagreement with the Agreement between Spain and Switzerland, he should direct the communication against the two States parties. As the communication is directed against Spain only, the Committee should find it inadmissible under article 3 of the Optional Protocol.

4.3 The State party also maintains that the basis of the discrimination alleged by the author is incorrect, since he does not compare two treaties but non-separable parts of two treaties, in this instance the part relating to the determination of the pension by Spain. Further, Germany and Switzerland are two separate States, with their specific legal regimes. It follows that the distinctive characteristics of the contracting States are taken into account whenever a treaty is concluded. Moreover, Spain has signed bilateral social security agreements with various other States, and each has its own regulations on social security coverage of those who have worked in each of the countries. Without any justification whatsoever the author differentiates between the Agreement with Germany and all others. There can be no allegation of discrimination when a distinction is objective and reasonable, since the agreements to be compared may not be separated out into arbitrary elements, and are not comparable between themselves, since the signatory States are different, and, thus, so are the bases for application. Neither is there any justification for choosing one agreement, rather than others, for comparative purposes.

Observations on the merits

4.4 On 15 January 2002 the State party submitted its observations on the merits of the communication.

4.5 The State party notes that the author has not indicated the exact amount of his Spanish and Swiss retirement pensions, or the amount of the Spanish and German retirement pensions that would accrue to him should the Agreement between Spain and Germany be applied. These figures are necessary for an appropriate comparison to be made. Moreover, it reiterates that citizens of a State may not demand the separate application of provisions in bilateral or multilateral instruments without regard to the rest of the instrument and the other contracting States. The differentiated treatment alleged by the author has an objective and reasonable justification in the sovereign authority of States to conclude bilateral agreements with other States in accordance with the considerations preferred by them. Consequently, the State party considers that the communication should be found inadmissible, in that it does not demonstrate the existence of discrimination.

Comments by the author

5.1 On 9 April 2002 the author responded to the State party's observations.

5.2 The author explains that, under Spanish legislation, a worker must have contributed to the social security scheme for at least 15 years to have the right to a retirement pension. Further, he or she must have contributed for at least two years during the eight years preceding the official retirement age. The amount of the pension is based on contributions in the years prior to the retirement date. For persons who retired in the year in which the author retired the period was the previous eight years.

5.3 When a person who has worked in Spain emigrates and ceases to contribute before beginning this final period of working life used for the calculation of the pension, his or her previous contributions in Spain, for the purposes of this calculation, are void and have no relevance. If the person emigrates to a country with which there is a social security agreement, pursuant to such an agreement the contribution period in that country is deemed valid for the purposes of calculating pension entitlement in Spain. In such cases the retirement pension is calculated on the basis of each agreement and varies from one country to another. Spain has concluded bilateral social security agreements with 29 countries. Ten are member countries of the European Union, and these agreements are no longer in force having been superseded by European Union regulations.

5.4 According to the author, the fact that Spanish social security legislation does not establish the same rules for the calculation of the pension that Spain must pay to all those who leave the country and cease to contribute to the Spanish social security scheme is the cause of the discrimination of which he is victim. The legislation does not cover the situation of emigrants. It establishes conditions for obtaining a pension. If these conditions are not met, and in general emigrants cannot meet them, there is no right to a pension. The social security agreements rectify this situation, but only in part.

5.5 The pensions granted by Spain to its emigrants are its exclusive concern, with funding that is exclusively Spanish, and in accordance with Spanish legislation. This does not concern the State with which Spain signs a social security agreement. Accordingly, there is no reason for the part dealing with determination of the Spanish retirement pension to differ from one agreement to another. It is not a subject of discussion with the other country in drafting the agreement in question. It would be more logical for all agreements to embody a specific national norm for calculating pensions, a norm which does not exist with regard to emigrants.

5.6 For the determination of the pension in Spain of a non-emigrant, the contribution history of the worker in the final years is used. However, in most bilateral agreements, this is not done, and this aspect is left open, or is the subject of clauses that provide for minimum calculations, rather than taking into account the actual contributions by the worker. With the entry of Spain into the European Union, the following criterion was introduced with regard to retirement benefits for Spanish emigrants to other countries in the Union: "The amount of the Spanish benefit payable in theory shall be calculated on the actual contribution basis for the contributor immediately prior to the final contribution to the Spanish social security system."[3] The 1994 Agreement on social security between Spain and Mexico employs an analogous concept, in concordance with the criteria used for calculating the pensions of retired workers in Spain.

5.7 The author states that the discrimination arising from the bilateral social security agreements generally has less impact on retirement pensions than in his case, for the following reasons:

(a) Because emigrants applying for a pension contributed for a shorter period in Spain than he did, since they were much younger when they emigrated, which reduces the impact on their pensions;

(b) Because these emigrants left Spain before the author did, and at that time contributions were lower;

(c) Because these emigrants paid contributions for lower professional categories, so that they were much lower.

5.8 The outcome is that the author receives a much lower pension than he would have had he not emigrated, equivalent to a pension generated by only 32 per cent of his actual contributions. This is not offset by the Swiss pension, as application of the pro rata temporis rule means that the amount of the pension is very small since he contributed only for the final years of his working life. If the actual contribution basis applicable to the author in Spain had, for example, been in the 1960s, application of the current minimum basis would redound to his benefit. In his case, in view of the closeness of his emigration date to his retirement date, the minimum basis redounded to his detriment.

5.9 According to the author, the literal application of article 14 of the bilateral Agreement seems to disregard or nullify his acquired rights or those being acquired as a migrant worker, which contravenes various national and international norms proclaiming the principle of the protection of such rights.[4]

5.10 The author rejects the State party's assertion that he has not indicated the amount of his Swiss pension, noting that it was stated in the appeal filed with the Constitutional Court. He also maintains that the Swiss pension was not calculated in accordance with the bilateral Agreement but in accordance with Swiss domestic legislation, and, since it is correct, is not disputed. With regard to the State party's assertion that the communication should be directed against both States parties to the Agreement, the author maintains the opposite, bearing in mind that:

(a) Switzerland is not a State party to the Optional Protocol;

(b) The Swiss pension he receives has been calculated independently, in accordance with article 7, paragraph 1, of the 1969 Agreement, and is equivalent to that received by a Swiss citizen or other foreign citizens working in Switzerland in the same circumstances. The Agreement makes no special provision for payment of the Swiss element of the pension, unlike the Spanish element;

(c) Switzerland has no competence in the determination or payment of, or in disputes relating to, the Spanish pension. It is the Spanish State that affords different treatment by proposing the incorporation without any reason, in drafting a social security agreement, of differing treatment that has no objective or rational justification.

5.11 The author also denies having sought application of the Agreement between Spain and Germany, as the State party appears to suggest. That Agreement was cited merely as an indication of the discriminatory treatment applied to the author. The State party, in determining retirement pensions differently under various bilateral agreements and in accordance with European Union regulations, discriminates on a random basis against emigrant workers. In his view, the State party should apply to migrants to any country in the world the mode of calculation applied to the pensions of its migrants to European Union countries. The State party should also propose the amendment of its bilateral agreements that do not allow for determination of the pension in the manner proposed.

Additional comments by the author

6.1 On 12 August 2003 the author sent the Committee information concerning new developments since his previous letter.

6.2 According to the author, on 1 June 2002 the bilateral Agreement on the free movement of persons between the European Union and Switzerland entered into force, making it possible for his Spanish pension to be calculated on the basis of Community legislation rather than the Agreement between Spain and Switzerland. To this end the author submitted appropriate requests to the competent administrative bodies, and filed an appeal before Madrid Social Court No. 4, which, in a judgement of 11 April 2003, awarded the author a pension of 1.363.06 euros a month from 1 June 2002 onwards, that is, three times more than the amount he had been receiving since 1995. The Spanish social security authority has implemented the judgement.

6.3 The author states that he has obtained satisfaction and has no claim against the State party with regard to the amount of his pension since 1 June 2002. However, he still considers that he has suffered discrimination under article 26 of the Covenant with regard to the period between 1 July 1995 and 31 May 2002. He thus reiterates the complaints made previously. The author recalls that the method of calculation applied to him from 1 June 2002 onwards, that is on the basis of his actual contributions, is the method he sought to have applied by the Spanish social security authority, in writing on 30 August 1996 and in his successive appeals.

6.4 The author also seeks a change in Spanish regulations to allow the calculation of the retirement pensions of all emigrants on the same basis as his is now calculated, that is, using the criteria applied to emigrants to European Union countries, irrespective of the country to which they emigrated.

6.5 The State party has not submitted any observations on the author's comments.

Issues and proceedings before the Committee

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

7.2 The Committee has ascertained, as required under article 5, paragraph 2, of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement, and notes that the author has exhausted all domestic remedies. With regard to the State party's argument that the author should also direct the communication against Switzerland, the Committee notes that the author does not contest the part of his pension that he receives from the Swiss social security system and that, furthermore, Switzerland has not ratified the Optional Protocol. The fact that the communication is directed only against Spain does not constitute an obstacle to its admissibility.

7.3 With regard to the author's claim that the different treatment of Spanish workers who emigrated to Switzerland on the one hand and Spanish migrants who went to other countries constitutes a violation of article 26 of the Covenant, the Committee notes that the author has not shown how this distinction is based on the race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status of these migrant workers. The less advantageous position of the author has its roots in the fact that, regarding the calculation of the Spanish part of the pension of persons who have worked in Spain and abroad, the bilateral treaties negotiated by Spain are not identical. However, the mere fact that different treaties on the same topic with different countries concluded at different times differ in content does not amount, as such, to a violation of article 26 of the Covenant. The author has not shown any additional elements that would make article 14 of the treaty with Switzerland arbitrary. The Committee, therefore, concludes that the facts submitted by the author do not raise any issue under article 26.

8. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

(b) That this decision shall be communicated to the author and the State party.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] The amount of the Spanish pension in 1995 was 62,174 pesetas (373.67 euros) and the amount of the Swiss pension was 578 Swiss francs, both per month.

[2] Article 14: "When … all or part of the contribution period elected by the worker for determination of the regulatory basis for calculation of the benefit in question is completed under Swiss legislation, the competent Spanish institution shall determine that basis by taking into

account the minimum contribution basis that was applicable in Spain for all or part of the period to workers in the same occupation as that exercised in Spain by the contributor." According to the author this provision was drafted at a time when the regulatory basis for a retirement pension, under Spanish legislation, was two contributory years over a period elected by the worker. With the promulgation of Act No. 26-1985 the regulatory basis became eight contributory years over a fixed period.

[3] Council Regulation (EEC) No. 1248/92, amending Regulation (EEC) No. 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, annex IV, part D; and regulation (EEC) No. 574/72 fixing the procedure for implementing Regulation (EEC) No. 1408/71.

[4] The author cites the European Code of Social Security of 1964, the European Convention on the Legal Status of Migrant Workers of 1977, and International Labour Organization Conventions Nos. 97 and 157, all ratified by Spain.

K. Communication No. 1037/2001, *Bator v. Poland*
(Decision adopted on 22 July 2005, eighty-fourth session)*

Submitted by:	Zdzislaw Bator (represented by counsel: the law firm of Winston and Strawn in Switzerland and Mr. Sloan and Leon Zelechowski, United States of America)
Alleged victim:	The author
State party:	Poland
Date of communication:	3 October 2001 (initial submission)
Subject matter:	Unfair hearing to dismiss individual as liquidator of company
Procedural issues:	None
Substantive issues:	Unfair hearing
Articles of the Covenant:	14, paragraphs 1 and 2
Articles of the Optional Protocol:	2

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 22 July 2005,

Adopts the following:

Decision on admissibility

1. The author of the communication is Zdzislaw Bator, an American and Polish citizen, currently residing in the United States of America. He claims to be a victim of violations of articles 2, paragraph 3 (a) and (b), and 14, paragraph 1, by Poland, of the International Covenant on Civil and Political Rights. He is represented by counsel: the law firm of Winston and Strawn in Switzerland and Mr. Sloan and Leon Zelechowski, United States of America.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen and Ms. Ruth Wedgwood.

Pursuant to rule 90 of the Committee's rules of procedure, Committee member Mr. Roman Wieruszewski did not participate in the adoption of the present decision.

Factual background

2.1 In 1986 the author formed a joint venture company with his brother Waldemar Bator ("Waldemar"), a Polish citizen residing in Plock, Poland. The business was named Capital Ltd. ("Capital") and its principal place of business was Plock. The author owned 81 per cent and Waldemar 19 per cent of the shares of the company. The author provided the funding for the company and Waldemar operated Capital's day-to-day operations in Poland. The author resided in the United States but travelled to Poland several times a year to assist in the running of the business.

2.2 In 1994, the author allegedly discovered that Waldemar and his wife were embezzling money from the company. The author spent several months in Poland trying to "save the business". However, in 1995, he decided that Capital should be dissolved. On 6 November 1995, in a meeting with Waldemar, the author, as the majority shareholder, passed a resolution dissolving Capital and elected himself as liquidator. At the meeting, Waldemar voted against the author's candidature and threatened that he would have the author removed as liquidator.

2.3 The author took several steps to liquidate Capital's assets, including selling some of Capital's real estate. On 18 December 1995, the Plock District Court sent the author notice that the liquidation should be entered immediately into the Commercial Registry. Waldemar obtained this notice from the Court on the same day that it was issued and faxed it to the author. The original notice arrived at Capital's offices in Plock on 27 December 1995. In response to this notice, the author filed a petition informing the Court that the liquidation had taken place on 3 January 1996.

2.4 On 18 December 1995, Waldemar filed his first motion to replace the author as liquidator. On 15 March 1996, the Plock District Court held a "closed hearing" on the motion to change liquidators. The hearing was not held in open Court but in the judge's chambers and according to the author neither he nor his lawyer were notified of the time and place of the hearing. As a result, neither was present to contest the motion. In addition, the case was heard by the Commerce Law Division of the District Court as a "registry case", allegedly in violation of applicable rules of Polish civil procedure. As such, according to the author, the Court's jurisdiction was incorrectly invoked. The judge ruled that Waldemar should replace the author as Capital's liquidator. Her reasons for this ruling included the author's failure to register the liquidation until 3 January 1996, and his United States residence, which rendered him less able to carry out the duties of liquidator (either personally or through his agents).

2.5 Pursuant to this ruling, the author's name was immediately deleted from the Commercial Register, and Waldemar's name was inserted as liquidator. According to the author, this was contrary to Polish law, because the District Court's ruling should not have been officially recognized until the author had had an opportunity to pursue an appeal. On 27 May 1996, the judge of the District Court reversed her ruling of 15 March 1996, admitting that she had exceeded her authority by entering Waldemar's name as liquidator in the Commercial Register. On 21 October 1996, an appeal by Waldemar was denied and in January 1997, the Registry was amended to show the author as liquidator.

2.6 In early 1997, Waldemar filed a second motion to change liquidators. On 11 July 1997, the same judge heard his application without any representation from the author and found for Waldemar. She provided almost identical reasoning to that provided in her ruling of 15 March 1996 ruling. On 30 October 1997, this decision was reversed by the Circuit Court as the author had not been properly informed of the date of the hearing and therefore the principle of equality of arms between the parties had not been respected. The Circuit Court returned the case to the District Court for reconsideration.

2.7 Prior to the reconsideration of this matter in the District Court on 15 October 1998, the author's lawyer had filed a motion requesting an adjournment, as the author was ill and unable to travel, and his lawyer could not represent him on the date in question. The Court did not acknowledge receipt of the motion to delay the hearing. According to the author, this request was delivered to the Court by 8.00 a.m. on the day of the hearing. A different judge presided over the proceedings and ruled in favour of Waldemar reiterating the reasoning of the District Court.[1] On 6 July 1999, the Circuit Court affirmed the District Court's ruling. The Court allegedly refused the author's request to testify and to present documentary evidence. The author filed several procedural motions to reopen the proceedings and to appeal before the Supreme Court. All these requests were denied.

The complaint

3.1 The author claims that his rights under articles 2 and 14 were violated, as he did not receive a fair and public hearing to defend himself against repeated attempts to dismiss him as liquidator. Each time the District Court dismissed the author as liquidator it did so in the author's absence, and allegedly refused to allow the submission of evidence to support his case. Similarly, during the hearing on 6 July 1999, the Circuit Court refused to allow the author to testify or to otherwise participate in the hearing. The author also claims that by hearing these motions in the absence of the author, the District Court violated article 379, paragraph 5, of the Civil Proceedings Code.

3.2 The author claims that the judges of the Plock District Court were neither independent nor impartial. In support of his claim, he observes that the District Court found in Waldemar's favour every time a motion to remove the author was before it, that the author was never informed of the time or place of the hearings; that the Court proceeded with the hearing on the third motion even though it was informed that the author was ill and could not attend; and that on the same day of each hearing the Court issued a full written judgement, which to the author suggests that the outcome was predetermined.

3.3 In addition, the author infers from the fact that Waldemar received the District Court's notice to register the liquidation on 18 December 1995, i.e. the same day it was issued, that Waldemar had prior knowledge from the Court that this notice would be issued. He also refers to the fact that after the District Court's ruling on the first motion, Waldemar's name was immediately entered in the Commercial Registry as liquidator. This was against Polish law and allowed Waldemar to act on Capital's behalf without authority. Even though the District Court reversed its decision, the Registry was not corrected until January 1997, three months after Waldemar's appeal to the Circuit Court had been finally determined and denied by that Court.

3.4 The author affirms that he was told by the District Court judge, who had presided over the first two motions, that she had been told what decision to make in this case by the judge who was supervising her. He claims that this supervising judge was having a romantic relationship with one of Waldemar's friends and that Waldemar's friend admitted to this relationship during a defamation suit which he filed against the author and three other individuals. During this hearing, he referred to the judge as his "fiancée".

3.5 To support his argument that the judges were neither impartial nor independent, the author refers to a World Bank report of 1999, which outlines the problems of corruption generally among the judiciary in Poland. Finally, the author admits that while all these allegations of corruption in paragraphs 3.2 to 3.4 do not constitute direct evidence, the combination of these events raise a strong inference of bias or at least unfairness against the author. The actions of the judiciary as a whole are said to have cost him "hundreds of thousands of dollars in losses".

State party's response on admissibility and the merits

4.1 On 8 July 2001, the State provided its submission on admissibility and the merits. It clarified the facts as follows: Waldemar had filed the first motion on 18 December 1995, on the grounds that the author lived in the United States and was thus unable to carry out the liquidation process in a proper manner, and that in the event of misuse of company funds, it would be practically impossible to sue him before Polish judicial authorities. On 25 January 1996, Waldemar informed the District Court that the author had sold real estate belonging to the company to the latter's wife on 20 January 1996. For these reasons, on 26 January 1996, the court held a hearing at which the author, albeit duly summoned, did not appear. Another hearing was set for 9 February 1996, at which the author also did not appear. As a consequence, the court postponed the hearing until 23 February 1996 and ordered the author's compulsory appearance at the hearing. On 23 February 1996, the author was present and the court ordered that information about the commencement of the liquidation proceedings be entered into the Commercial Register. At the next hearing on 8 March 1996, the author's lawyer was present.

4.2 On 15 March 1996, the Plock District Court erroneously ordered changes to be made to the Commercial Register, without waiting for a final and enforceable order, in accordance with the Polish Commercial Code. As a result, on 27 May 1996, the same court ordered that the changes already introduced be removed. The decision of 11 July 1997 to dismiss the author as liquidator was quashed on 30 October 1997 by the Circuit Court, which sent the case back to the District Court, as the author had not been properly summoned and was unrepresented at the hearing. On 15 October 1998, after re-examining the case, the Plock District Court dismissed the author as liquidator and appointed Waldemar. The Circuit Court dismissed the author's appeal of this decision and concluded that he had been duly summoned to the hearing even if he was unable to attend and that the court had had ample opportunity to formulate an informed opinion on the petition in his absence. In the appeal to the Supreme Court, his claim was similarly dismissed.

4.3 The State party submits that the communication is manifestly ill-founded and contests the claim that the author was prevented from presenting documentary evidence or participating in the court proceedings. Except for the hearing on 11 July 1997, at which the court erroneously assumed that the author was properly informed about the hearing, an error remedied by the

Circuit Court, there is no evidence that the author was not duly summoned to all other court hearings in his case. As a result of the decision of the Circuit Court, the case was remitted back to the first instance court. The author did not appear at this hearing, even though he was duly summoned. The State party argues that in his absence, the court was able to examine the case on the basis of the written arguments provided.

4.4 The State party recalls that the author and his counsel were repeatedly summoned to the court hearings, and that both testified before the courts. In fact, for the greater part of the proceedings, the author was represented by two lawyers. Thus, it cannot be said that the author had no opportunity to present his position to the court. In addition, the author's lawyers filed numerous procedural writs with the court, in which they presented their client's position in detail. In the State party's view, it cannot be held responsible for the author's inability to attend each court hearing. The mere fact that the courts decided against him does not mean that he was deprived of fair proceedings.

4.5 As to the allegations of corruption in the District Court, the State party submits that they are unsubstantiated, that the report of the World Bank on corruption is of no relevance and cannot be considered direct evidence of corruption in the District Court of Plock. It adds that the allegations with respect to certain judges of the Plock District Court are defamatory and constitute an abuse of the right of submission. In addition, by failing to make an application under articles 77 and/or 417 of the Civil Code for harm caused by public officials, the author has not exhausted remedies available with respect to the alleged losses caused as a result of the judiciary's misconduct. Should the Committee consider the case sufficiently substantiated, the State party submits that the author has failed to demonstrate a violation of any of the provisions of the Covenant.

The author's comments on the State party's submission

5.1 On 10 October 2002, the author commented on the State party's submission. He submits that his failure to be present at the hearing on 26 January 1996, was due to his son's illness, of which he informed the Court. He highlights the State party's failure to refer to the following issues: the author's request, due to his illness, to adjourn the hearing on 15 October 1998; the judge's decision to consider the case on 15 October 1998 "privately", outside the courtroom, despite her alleged initial decision to adjourn the case; the Circuit Court's refusal, on 6 July 1999, to permit the author to participate in the proceedings and its threat to have the author arrested if he continued to insist on participating; and the fact that the same judge who had dismissed his appeal in the Supreme Court considered and dismissed an application to reopen the case.

5.2 The author submits that on hearing his motion to reopen the proceedings, both the Circuit Court and the Supreme Court focused on the distinctions between "registry cases" and "commercial cases", glossing over the due process issues highlighted by the author. The author challenges the State party's view that the author's failure to participate in the hearing on 15 October 1998, due to his illness, is of no consequence, as the court was in possession of his written arguments. As to the claim that he failed to exhaust domestic remedies in his claim against individual judges, the author notes that such a claim would have been futile, since he had already failed to receive relief from the Circuit Court and the Supreme Court for the same due process violations, there is therefore no reason to expect a different result in proceedings under these articles. In addition, he had already spent five years attempting to protect his rights before the Courts and the pursuit of further proceedings would be unreasonably prolonged.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 As to the author's claim that he did not receive a fair and public hearing to defend himself against repeated attempts to dismiss him as liquidator, the Committee observes that the author's allegations relate primarily to the evaluation of facts and evidence by the courts. It recalls that it is in principle for the courts of States parties, and not for the Committee, to evaluate facts and evidence in a particular case, unless it is apparent that the courts' decisions are manifestly arbitrary or amount to a denial of justice.[2] In the instant case, the Committee notes that both the Circuit Court and Supreme Court considered the author's claims and it finds no evidence that these court decisions suffered from such defects. The Committee therefore concludes that the author has not substantiated his claim and that this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.3 In relation to the author's claim that the judges involved in the adjudication of his case were neither impartial nor independent, the Committee considers that by failing to raise these issues in any forum or pursuing other available remedies the author has not exhausted domestic remedies and the claim is thus inadmissible under article 2 of the Optional Protocol.

7. Accordingly, the Committee decides:

(a) That the communication is inadmissible, under article 2 of the Optional Protocol;

(b) That this decision be transmitted to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] According to the judgement, the Court gave several reasons for its decision and determined that the author had failed to fulfil his responsibilities as liquidator under the Commercial Code.

[2] See communication No. 541/1993, *Errol Simms v. Jamaica*, inadmissibility decision of 3 April 1995, para. 4.3.

L. Communication No. 1092/2002, *Guillén v. Spain* (Decision adopted on 29 March 2005, eighty-third session)*

Submitted by:	Ms. Josefa Guillén Martínez (represented by counsel)
Alleged victim:	The author
State party:	Spain
Date of communication:	16 June 1999 (initial submission)
Subject matter:	Irregularities in proceedings relating to custody of a minor
Procedural issues:	Case submitted under another procedure of international investigation or settlement; exhaustion of domestic remedies
Substantive issues:	Right to a public hearing by a competent and impartial tribunal; right not to be subjected to arbitrary or unlawful interference with privacy and family
Articles of the Covenant:	14, paragraph 1; 17
Articles of the Optional Protocol:	2; 5, paragraphs 2 (a) and (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 29 March 2005,

Adopts the following:

Decision on admissibility

1. The author of the complaint is Ms. Josefa Guillén Martínez, a Spanish national resident in France, who claims that she is the victim of a violation by Spain of articles 14, paragraph 1, and 17 of the Covenant. She is represented by counsel J.L. Mazón Costa.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson López, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Factual background

2.1 In July 1992 the author and her husband, who had two minor sons, separated. In the separation judgement, dated 15 July 1992, guardianship and custody of the older son was granted to the father and guardianship and custody of the younger son, Daniel, to the mother, both parents to continue to share parental authority. Following the separation, the author moved her residence to France and, with the authorization of the court, took her son Daniel with her. The judicial authorization imposed certain conditions as to visits, as a result of which the author had to travel 1,000 kilometres every fortnight so that her son could spend the weekend with his father.

2.2 On 12 July 1993, the father applied to the court for a change in the arrangements for guardianship and custody, asking for custody of Daniel to be withdrawn from the mother and custody of both sons entrusted to the father. To that end he presented to the court a written authorization which the author had granted a long time previously in favour of a particular attorney during the separation proceedings. The authorization was out of date as the author had ended her professional relationship with the attorney in question. The court, which had initially agreed to summon the author by means of an international letter of request, cancelled the letter and accepted the authorization despite the fact that it should have been submitted by the attorney in whose favour it had been granted, and not the opposing party. Consequently, the court's notifications were sent to the domicile of the former attorney instead of the author's domicile, so that she was not aware that the proceedings had been initiated.

2.3 On 2 April 1994 the boy's father, who was living in Lorca, Murcia, removed the boy from the mother's custody during a visit to France and took him to Spain, where he entrusted him to the care of his paternal grandparents. The author lodged a complaint of abduction and unlawful detention of her son, and it was in that context that her counsel learned by chance that proceedings had been initiated to remove custody of her son from the author.

2.4 On 18 April 1994, the author lodged an application through a solicitor and a barrister in the proceedings for change of custody, requesting the court, in accordance with article 240, paragraph 1, of the Organization of Justice Act, to quash and declare void the actions taken since the time when the summons should have been issued. This request was denied, and on 11 July 1994 the court granted custody of both children to their paternal grandparents as the solution most appropriate to the children's interests. The court's decision also established an alternative arrangement for custody over the two sons in favour of the mother in case the grandparents refused to take charge of their care and upbringing. According to the author, this decision is surprising bearing in mind that no application had been made for custody in favour of the grandparents, the father having sought custody for himself.

2.5 Meanwhile, on 2 July 1994, the author took Daniel away from a campsite he was visiting with his father, while the father's attention was briefly distracted, and travelled with him to France.

2.6 The author appealed against the court ruling of 11 July 1994. Oral proceedings were held in the Murcia provincial high court on 21 January 1997. As a result of confusion in his schedule, her counsel did not appear at the hearing, despite which the court examined the substance of the case. In its ruling of 22 January 1997 the court fully upheld the previous decision, stating that although the unjustified failure of counsel to appear had prevented the court from learning of the causes and grounds for his opposition to and disagreement with the decision of the court of first instance, that failure in no way prevented the court from considering all the evidence. The author states that the high court's decision led her to lodge a criminal complaint against the lower court judge, in view of the corporate spirit which prevailed among the judges. However, the author does not explain the grounds for the complaint.

2.7 On 24 February 1997 the author instituted *amparo* proceedings in the Constitutional Court, claiming that her right to an adversary procedure and her right to a defence had been breached. Firstly, a procedure had been followed to deprive her of the custody of her son despite the fact that she had not been summoned to the court and had not become aware of the proceedings until April 1994, when the evidence had already been heard. Secondly, guardianship and custody had been granted to the grandparents although that solution had not been requested by the father or subjected to any opposing arguments. The author also claimed a breach of her right to respect for privacy in family life.

2.8 On 26 May 1997 the Constitutional Court rejected the application. The court considered that the counsel's failure to appear at the hearing as mentioned in the notice of appeal meant that available judicial remedies had not been exhausted, so that a condition laid down in article 44 of the Constitutional Court Act for the admissibility of an *amparo* application had not been met. The court also considered that certain grounds set out in the application clearly lacked any foundation in the Constitution which would justify a decision as to substance.

2.9 On 13 May 1996 the author lodged a complaint with the European Commission of Human Rights, which was subsequently withdrawn by letter of 4 October 1996. The author attaches a copy of a letter from the secretariat of the Commission dated 11 October 1996 taking note of the request that the complaint should be withdrawn. The letter states that, as the complaint had been registered, the Commission would rule on it.

The complaint

3.1 The author states that, as she was not informed by the judge of the proceedings that had been initiated against her, there was a violation of article 14, paragraph 1, of the Covenant, which protects the right to a hearing. Since she was not informed, she was unable to contest the allegations contained in the application and refute them. Nor was she able to apply for a rehearing, as provided for in article 773 of the Civil Procedure Act, since such rehearings are limited to cases where the defendant remains in default throughout the proceedings. She, however, made a submission in writing on 18 April 1994, when almost all the evidence had been heard and no new allegations could be made. Furthermore, her right to a competent judge, set out in the same provision of the Covenant, was breached, since the judge who heard the case lacked the sensitivity required to adopt reasonable solutions.

3.2 The Murcia provincial high court denied the author justice, in violation of article 14, paragraph 1, of the Covenant, by holding that the unjustified failure of counsel to appear at the hearing had prevented the court from learning of the causes and grounds for the opposition to and disagreement with the ruling of the court of first instance. Those causes and grounds were set out in the notice of appeal itself. In addition, the decision of the high court committed the same breaches of fundamental rights as the decision of the lower court.

3.3 Article 14, paragraph 1, was violated on two other grounds. Firstly, because the decision of the court of first instance did not correspond to the request made, since the father had sought custody of the two children for himself, whereas the court granted custody to the paternal grandparents. Secondly, because the ruling of the Constitutional Court distorted the facts of the case and was arbitrary.

3.4 The author also claims that the decision to deprive her arbitrarily of the custody of her younger son constitutes a violation of her right to freedom from unlawful interference with her privacy, set out in article 17 of the Covenant. There were no grounds for transferring custody of the child to the paternal grandparents and thereby depriving him of the company of his mother, the person with whom he normally lived and who took perfect care of him.

State party's observations on admissibility and on the merits

4.1 On 27 September 2002 the State party challenged the admissibility of the complaint. Firstly, it points out that the author failed to provide the Committee with the letter dated 4 October 1996 in which she informed the European Commission of Human Rights of her decision to withdraw her complaint. She also failed to forward the decision taken by the Commission on 28 November 1996 to close the case, which indicated that, in accordance with article 30, paragraph 1, of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Commission considered that there were no particular circumstances in relation to the rights guaranteed under the Convention which might justify continued examination of the application. Hence the same matter was brought before another international body, which, contrary to the author's assertions, did examine it and closed the case, no human rights having been violated. Consequently, the State party maintains that the complaint is inadmissible under article 5, paragraph 2 (a), of the Optional Protocol.

4.2 The State party also claims that the complaint should be considered inadmissible under article 5, paragraph 2 (b), of the Protocol, on the grounds that domestic remedies have not been exhausted. In her very short notice of appeal against the court decision of 11 July 1994, the author cites fundamental rights she claims to have been violated but offers no grounds for the violation. The lack of grounds was not rectified during the oral proceedings owing to counsel's failure to appear. Hence the Constitutional Court considered that as a result of the counsel's failure to appear, it had not been possible, before the matter was brought before it, to exhaust the possibilities offered by the legal system to enable the organs of the judiciary to remedy the violation of the fundamental rights which is alleged to have occurred - an indispensable condition required by the nature of the remedy of *amparo* as a review mechanism. According to the State party, just as the review function of the Constitutional Court prevents it from taking a position on complaints which have not been sufficiently elucidated in the ordinary courts, the Committee cannot examine complaints which were not properly brought through domestic channels.

4.3 On 23 January 2003 the State party submitted its observations concerning the merits of the complaint, affirming that there had been no violation of the Covenant. The State party repeats that the complaint should be deemed inadmissible for the reasons set out above. It also states that disagreement with a court decision does not signify that it was handed down by an arbitrary judge lacking in sensitivity, unless the allegation is duly substantiated and justified. This was by no means so in the present case, in which the author confines herself to general condemnation without any objective argument.

Author's comments

5.1 In a letter dated 12 May 2003 the author responded to the State party's observations on the admissibility of the complaint. Concerning the argument that the same matter had been brought before the European Commission of Human Rights, the author holds that the Commission did not examine the merits of the case, but confined itself to stating that there were no particular circumstances which called for continued examination of the application notwithstanding its withdrawal.

5.2 Concerning the non-exhaustion of domestic remedies, the decision of the Provincial High Court acknowledged that the counsel's failure to appear in no way prevented the court, in the exercise of its review functions, from considering all the evidence supplied and then handing down an appropriate ruling. Furthermore, the notice of appeal complained of the violation of various fundamental rights. Consequently, the reasoning of the Constitutional Court to the effect that the counsel's failure to appear prevented domestic remedies from being exhausted lacks justification and contradicts the thrust of the high court's decision. Lastly, the author accuses the lower court judge of behaving in an arbitrary manner and displaying a hostile attitude towards her, without giving greater detail of this accusation.

Issues and proceedings before the Committee

6.1 In accordance with rule 93 of its rules of procedure, before considering any claims contained in a complaint, the Human Rights Committee must decide whether or not the complaint is admissible under the Optional Protocol to the Covenant.

6.2 The Committee takes note of the State party's argument that the same matter was examined by the European Commission of Human Rights and that the complaint is consequently inadmissible under article 5, paragraph 2 (a), of the Optional Protocol. The Committee notes that on 13 May 1996 the author lodged a complaint with the Commission, which was withdrawn by letter of 4 October the same year. In its ruling of 28 November 1996, the Commission took note of the withdrawal of the application and considered that there were no particular reasons in relation to the rights set out in the European Convention to examine the application further. The Committee therefore considers that the case was not examined under another procedure of international investigation or settlement.

6.3 Concerning the need to exhaust domestic remedies, the State party holds that the notice of appeal did not adequately substantiate the grounds for the appeal, and that this lack of grounds was not rectified during the oral hearing owing to counsel's failure to appear. However, the Committee notes that these facts did not prevent the Provincial High Court from ruling on the appeal, and that the author subsequently made an *amparo* application to the Constitutional Court, in which she described the events and the rights which had been violated. The Committee therefore considers that the author did exhaust all available domestic remedies, in accordance with article 5, paragraph 2 (b), of the Optional Protocol.

6.4 The author states that, not having been informed by the judge of the proceedings initiated against her, she was unable to appear in court until several months after the application had been lodged, when practically all the evidence had been presented and new allegations could not be made, resulting in a violation of article 14, paragraph 1, of the Covenant, which sets out the right to a hearing. However, the Committee notes that the author had an opportunity to submit new evidence and allegations as part of the appeal, and that the errors in her defence, in particular the counsel's failure to appear at the hearing, cannot be attributed to the State party. Consequently, the Committee considers that this part of the complaint has not been adequately substantiated, and must be declared inadmissible under article 2 of the Optional Protocol.

6.5 The author also claims violation of article 14, paragraph 1, of the Covenant because the judge in the case lacked competence and impartiality, and also because the decision of the court of first instance did not correspond to the request made, since the father had sought custody of the two children for himself, whereas the court granted custody to the grandparents. The Committee notes that the author wishes the Committee to examine the facts and evidence in the case, and reiterates its jurisprudence that their evaluation falls within the competence of domestic courts, unless it is obvious that such evaluation is arbitrary or tantamount to a denial of justice. The Committee considers that the author has not substantiated her complaint sufficiently to be able to claim such arbitrariness or denial of justice, and consequently considers that this part of the complaint should also be declared inadmissible under article 2 of the Optional Protocol.

6.6 With respect to the violation of article 17 claimed by the author, on the grounds that she was deprived of the custody of her younger son, the Committee also notes that it is not competent to examine the facts and evidence in the case, and that the author has not demonstrated that their evaluation by the domestic courts was arbitrary or tantamount to a denial of justice. Therefore, this part of the complaint should also be declared inadmissible under article 2 of the Optional Protocol.

7. The Committee therefore decides:

(a) That the complaint is inadmissible under article 2 of the Optional Protocol;

(b) That this decision shall be communicated to the author and the State party.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

M. Communication No. 1097/2002, *Martínez II v. Spain* (Decision adopted on 21 July 2005, eighty-fourth session)*

Submitted by:	Juan Martínez Mercader, Esteban Fajardo Monreal and Jesús Nicolás Orenes (represented by counsel)
Alleged victim:	The authors
State party:	Spain
Date of communication:	13 August 1999 (initial submission)
Subject matter:	Discrimination in the remuneration of local government employees
Procedural issues:	Failure to substantiate the complaint
Substantive issues:	Assessment of the facts and evidence by the domestic courts
Articles of the Covenant:	14, paragraph 1, and 26
Articles of the Optional Protocol:	2

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 21 July 2005,

Adopts the following:

Decision on admissibility

1. The authors of the communication are Juan Martínez Mercader, Esteban Fajardo Monreal and Jesús Nicolás Orenes, Spanish nationals, who allege that they are victims of violation by Spain of article 14, paragraph 1, and article 26 of the Covenant. They are represented by counsel, José Luis Mazón Costa.

Factual information

2.1 The authors worked as a plumber, bus driver and locksmith, respectively, for the municipal authority in Alcantarilla, Murcia. In addition to their full workday, they also served in the municipal authority's fire department, which required them to be physically present in the fire station to wait for emergencies. The authors received a monthly bonus for these services. In December 1994 they filed a complaint against the municipal authority with Employment Tribunal No. 3 in Murcia, claiming that they had been inadequately paid for services provided during the period from 1 February 1993 to 31 January 1994. The pay received did not correspond to the level of remuneration for overtime hours set by collective agreement, or even to the level for regular hours.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Sir. Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen and Ms. Ruth Wedgwood.

2.2 On 29 December 1995 the employment tribunal rejected the claim, maintaining that, in the light of previous decisions, including a decision issued by the Supreme Court on 5 June 1982, hours spent on call could not be considered to constitute overtime. Only hours in excess of normal working hours that were actually spent fighting fires or carrying out other specific duties of firemen could be considered to constitute overtime.

2.3 This decision was appealed through a request for reversal of the tribunal's decision, which was rejected on 13 May 1997 by the Superior Court of Justice in Murcia. That court ruled that time spent in the fire station while on call could not be considered to constitute actual working time, and thus was not payable as overtime, particularly when no hours of actual work had been proved.

2.4 The authors filed an appeal for unification of doctrine with the Supreme Court, which was rejected on 13 January 1998 on the grounds that the decision in question was not identical to the one with which it was being contrasted under the appeal. Lastly, the authors filed an application for *amparo* with the Constitutional Court, which was rejected in October 1998 as being devoid of substance.

The complaint

3.1 The authors allege a violation of their right to due process under article 14, paragraph 1, of the Covenant for the following reasons:

- Although Employment Tribunal No. 3 recognized the time spent on call in the fire station as constituting part of the workday, it rejected the request on the grounds that the authors had not provided any proof of hours actually spent fighting fires or carrying out other duties of a fireman. According to the authors, that issue had never been raised;

- The decision of the Superior Court of Justice was inconsistent. The same court rejected the request to have the periods spent on call paid at the regular hourly rate, if not as overtime, because it maintained that that subsidiary request had not been made in the court of first instance;

- The Supreme Court's decision in the appeal for unification of doctrine was arbitrary, since the circumstances, points of law and claims were identical in the two decisions being contrasted. The only difference was the applicable collective agreement.

3.2 The authors also allege discrimination under article 26 of the Covenant. The decisions cited establish that the authors were not entitled to any remuneration for hours spent on call at the fire station, during which time the situation could change from one of utter tranquillity to one of imminent danger and they could not enjoy family life or take part in any leisure activities.

Yet any other fireman or worker who spent periods of time on call was entitled to be remunerated for those periods, independently of whether or not he had actually worked. Specifically, any fireman was entitled to payment for any hours spent on call in excess of regular working hours, and that entitlement had been denied the authors.

State party's observations on admissibility and the merits and authors' comments

4.1 On 9 October 2002 the State party contested the admissibility of the communication. On 23 January 2003 the State party reiterated its view that the complaint was inadmissible and that there had been no violation of the Covenant by the State party.

4.2 The State party maintains that when the authors submitted their application for overtime to the court of first instance, they should have provided material and legal proof that the hours in question were in fact overtime. When they failed to do so, the judge, applying the law correctly, rejected their claim. During the appeal phase the authors formulated a subsidiary request, namely, that the hours in question should be considered as regular hours. However, it was not possible to consider an appeal relating to a matter that had not been raised, even though it could have been, in the court of first instance. In addition, the allegation that the right to a defence had been violated because the Supreme Court had rejected the appeal for unification of doctrine is frivolous in the light of the Court's reasoning. The authors, who held various jobs, received special monthly bonuses for their service with the fire department. The contrasting decision cited in the appeal to the Supreme Court was not an appropriate example, since the workers to whom it applied were professional firemen whose working hours corresponded to their jobs as firemen.

4.3 According to the State party, the communication reflects nothing that might imply a violation of the Covenant, but merely the authors' dissatisfaction at having failed in their domestic remedies. Consequently the communication must be considered inadmissible, in accordance with article 3 of the Optional Protocol, as an abuse of the right of submission of communications.

5.1 On 28 August 2003 the authors transmitted to the Committee their comments on the State party's observations. They insist it can be deduced from the employment tribunal's decision that the more than 1,000 hours each of them had spent on call at the fire station had not been counted, and that only those hours during which they were out fighting fires or conducting rescue operations had been. The rest of the time they were providing free labour. In addition, the Supreme Court decision of 5 June 1982, which the judge had cited as a precedent, had nothing to do with the authors' case. That decision applied to certain employees of a provincial office who, while performing their own regular jobs, also remained on call by means of a two-way radio. Those employees received additional pay for any firefighting or rescue duties they performed, since the rest of the time they were performing their regular jobs.

5.2 According to the authors, the employment tribunal's decision ran counter to the terms of the collective agreement reached with the Alcantarilla municipal authority, by virtue of which they were entitled to payment for any hours worked beyond the regular workday at a rate of 175 per cent, or at least 100 per cent of their regular pay. When their case was heard the representative of the municipal authority neither denied the hours spent nor claimed that they were not payable or payable only if the authors were on active duty, but had indicated that they would be paid at the same rate as regular hours. The Superior Court of Justice also held it against the authors that they had not requested payment for regular hours, which amounted to a denial of the principle of "*quien pide lo más pide lo menos*" [whereby a request for a higher amount, i.e. overtime pay, is automatically assumed to include a lower amount, in this case pay at the regular hourly rate].

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 97 of its rules of procedure, decide whether the complaint is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a), of the Optional Protocol.

6.3 With regard to the authors' claim that the situations reported constitute a violation of article 14, paragraph 1, of the Covenant, the Committee considers that the allegations relate in substance to the assessment of facts and evidence made by the Spanish courts. The Committee recalls its jurisprudence[1] and reiterates that it is generally not for itself, but for the courts of States parties, to review or to evaluate facts and evidence, unless it can be ascertained that the conduct of the trial or the evaluation of facts and evidence was manifestly arbitrary or amounted to a denial of justice. The Committee considers that the authors have not sufficiently substantiated their complaint to be able to state that such arbitrariness or a denial of justice existed in the present case, and consequently believes that this part of the communication must be found inadmissible under article 2 of the Optional Protocol.

6.4 With regard to the authors' claim that the situations reported constitute a violation of article 26 of the Covenant, the Committee considers that the authors have not sufficiently substantiated their complaint to be able to conclude that there was discrimination on one of the grounds specified in that article. Consequently, this part of the communication is also inadmissible under article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

(b) That this decision shall be communicated to the authors and to the State party.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Note

[1] See, for example, communication No. 541/1992, *Errol Simms v. Jamaica*, decision adopted on 3 April 1995, para. 6.2, and communication No. 842/1998, *Sergei Romanov v. Ukraine*, decision adopted on 30 October 2003, para. 6.4.

N. Communication No. 1099/2002, *Marín v. Spain* (Decision adopted on 18 March 2005, eighty-third session)*

Submitted by:	Ms. Catalina Marín Contreras (represented by counsel)
Alleged victim:	The author
State party:	Spain
Date of communication:	3 September 1999 (initial submission)
Subject matter:	Right to obtain compensation for death in a traffic accident
Procedural issues:	Inadmissibility under article 2 of the Protocol
Substantive issues:	Assessment of facts and evidence by the domestic courts
Articles of the Covenant:	14, paragraph 1, and 26
Article of the Optional Protocol:	2

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 17 March 2005,

Adopts the following:

Decision on admissibility

1. The author of the communication is Ms. Catalina Marín Contreras, a Spanish national, who alleges that she is a victim of a violation by Spain of article 14, paragraph 1, and article 26 of the Covenant. She is represented by counsel, José Luis Mazón Costa.

The facts as submitted by the author

2.1 On 31 May 1992, the author's husband was involved in a traffic accident in which he lost his life. He bore principal responsibility for the accident, since he drove onto the left-hand side of the road and collided head-on with another vehicle carrying Mr. Sánchez Gea. A witness who travelled in another vehicle for roughly a kilometre behind the one which caused the accident stated that the vehicle which caused the accident was travelling some of the time along the central white line, and at a certain moment veered completely into the left-hand lane. According to the author, Mr. Sánchez Gea was also responsible for the collision, since he failed to notice that over a straight stretch of road, over a distance of roughly a kilometre, and in conditions of good visibility, a vehicle was approaching him from the opposite direction which was zigzagging and veering onto the wrong side of the road.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

2.2 The author instituted proceedings against the company which had insured Mr. Sánchez Gea's vehicle in the court of Caravaca de la Cruz in order to obtain compensation for the death of her husband. The application was refused. She then lodged an appeal with the Murcia provincial high court, which was also denied. The author then applied to the Supreme Court for a declaration that a judicial error had been committed. This application was rejected on the grounds that the remedy in question is not applicable when, as in this case, the parties only disagree on the evaluation of the evidence by the corresponding courts as part of their judicial functions. Finally, the author instituted *amparo* proceedings in the Constitutional Court for the protection of her constitutional rights on the grounds of judicial error. This application was also denied.

The complaint

3.1 The author maintains that the denial of compensation for the death of her husband constitutes a breach of her right to equal treatment under article 14, paragraph 1, of the Covenant for two reasons. Firstly, because her case was very similar to others in which, when there was any form of guilt, however slight, on the part of the other driver involved in the accident, the person principally responsible for the accident was acknowledged to have a right to compensation, in pursuance of article 1.2 of the Motor Vehicles (Use and Circulation) Act. Secondly, the restrictive jurisprudence of the Supreme Court in relation to judicial errors, has had adverse consequences for her.

3.2 The author also maintains that there was a breach of the right to adversary proceedings under article 14, paragraph 1, of the Covenant, since in the appeal proceedings the court made use of arguments which had not been subjected to rebuttal or argument. In addition, in the proceedings before the Supreme Court, the author had not been able to respond to or comment on the reports of the judicial bodies involved.

State party's observations on admissibility and the merits and author's comments

4.1 On 27 September 2002 the State party challenged the admissibility of the complaint. On 17 January 2003, the State party reiterated its view that the complaint was inadmissible and that there had been no violation of the Covenant.

4.2 Concerning the violation of the right to equal treatment under article 14, paragraph 1, of the Covenant, the State party points out that the author makes no claim of a distinction based on arbitrary or unreasonable treatment, and emphasizes that her account of the events is a subjective one. Concerning the violation of the right to adversary proceedings, the State party indicates that the items of information or circumstances referred to in the ruling handed down by the provincial high court already appeared in the technical reports included in the case file in the court of first instance. In addition, this allegation was not made in the domestic courts, so that it should be considered inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

4.3 The State party points out that the reason for the complaint is the fact that the author disagrees with the manner in which the judicial bodies evaluated the evidence. But the author has not shown that the actions of the judicial bodies were arbitrary or denied her justice, and the State party considers that the complaint constitutes a clear abuse of the right to submit complaints.

5.1 On 15 May 2003 the author reiterated the arguments already set out in her initial complaint and added that, in addition to the articles of the Covenant referred to previously, her rights under article 26, taken together with article 2 of the Covenant, had been violated.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 97 of its rules of procedure, decide whether the complaint is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a), of the Optional Protocol.

6.3 With regard to the author's claim that the situations reported constitute a violation of article 14, paragraph 1, of the Covenant, and article 26 taken together with article 2, the Committee considers that the allegations relate in substance to the assessment of facts and evidence made by the Spanish courts. The Committee recalls its jurisprudence and reiterates that it is generally for the courts of States parties to review or to evaluate facts and evidence, unless it can be ascertained that the conduct of the trial or the evaluation of facts and evidence was manifestly arbitrary or amounted to a denial of justice. The Committee considers that the author has not sufficiently substantiated her complaint to be able to state that such arbitrariness or such a denial of justice existed in the present case, and consequently believes that the complaint must be found inadmissible under article 2 of the Optional Protocol.

7. The Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

(b) That this decision shall be communicated to the author and to the State party.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

O. Communication No. 1105/2002, *López v. Spain* (Decision adopted on 26 July 2005, eighty-fourth session)*

Submitted by:	Concepción López González (represented by counsel, Mr. José Luis Mazón Costa)
Alleged victim:	The author
State party:	Spain
Date of communication:	28 July 2000 (initial submission)
Subject matter:	Right to request the summons of an expert on the same terms as the defendant in an action under labour laws
Procedural issues:	Adequate substantiation of the alleged violation - exhaustion of domestic remedies
Substantive issues:	Equality of arms in the courts
Article of the Covenant:	14, paragraph 1
Articles of the Optional Protocol:	2 and 5, paragraph 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 26 July 2005,

Adopts the following:

Decision on admissibility

1. The author of the communication dated 28 July 2000 is Ms. Concepción López González, a Spanish citizen. She claims to be the victim of a violation by Spain of article 14, paragraph 1, of the Covenant. The Optional Protocol entered into force for the State party on 25 April 1985. The author is represented by Mr. José Luis Mazón Costa.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Edwin Johnson López, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Michael O'Flaherty, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Factual background

2.1 The author was employed as a temporary worker by the Fruta Romu company. On 2 July 1993, eight days before her contract ended, she had an occupational accident when she was struck in the right eye by a lemon. The effects of the injury worsened as time went by. She suffered a detached retina and had to be operated on several times, and was left with a 45 per cent decrease in vision in the injured eye. The author did not go to a doctor for treatment immediately, but a month after the accident, on 2 August 1993, when she went to the Beniaján health centre to complain of vision problems. On the following day, 3 August 1993, she was operated on, for a detached retina, at the General University Hospital. The ophthalmologist who operated on her explained in his report that the appearance of a tear leading to detachment of the retina weeks after the accident was consistent with a blow to the eye.

2.2 On 24 June 1994, the author filed a lawsuit against the company, the National Social Security Institute, the National Health Institute, the Social Security Regional Treasury and the Frenap mutual society (an employers' association), requesting that the accident be recognized as an occupational accident and the defendants ordered to pay compensation.

2.3 On 27 February 1995, the author requested that the judge should summon two witnesses and the ophthalmologist who had attended her in the General University Hospital in Murcia. The judge agreed to summon the witnesses but not the doctor, without giving reasons for his decision.

2.4 In a ruling dated 17 March 1995, Murcia employment tribunal No. 3 rejected the author's claim. The judge found no evidence that the author's injury had been caused when she was working for the company named in the suit. The author considers that the testimony she had requested was vital to the outcome of the case. She maintains that the ruling was principally based on the opinion of the expert put forward by the defendant (an employers' association), who did not believe that the author's accident could have caused the injury. If it had been the cause, since the author was predisposed to injury because she suffered from a basic pathology (myopia magna), the detachment of the retina would have occurred sooner. The ophthalmologist who operated on her, however, concluded in his report that an ocular contusion with subsequent tearing might well have given rise to a detached retina a month after the accident.

2.5 The author filed an application for reconsideration of the judgement, requesting that the evidence be properly assessed, taking into account that the expert evidence proposed by the defendant had been heard in court, while the testimony of the expert proposed by the author had been disallowed without cause. The High Court dismissed the application on 25 September 1996. The author filed an appeal for unification of doctrine before the Employment Division of the High Court, which dismissed it on 10 June 1997.

2.6 On 21 October 1997, the author filed an application for judicial review before the Supreme Court, citing a previously undisclosed document which revealed that the company had failed to register the author in the General Social Security System for four months; this explained why the company did not report the accident and why its representatives denied that an occupational accident had occurred. The application was dismissed on 30 June 1998. The Supreme Court held that the document on which the application was based could have been obtained and submitted earlier, during the proceedings. Finally, the author filed an application for *amparo* before the Constitutional Court, alleging that her right to effective legal protection had been violated, in that she had been left without a defence by the refusal to allow the doctor's testimony to be heard even though the expert evidence proposed by the defendant had been allowed. On 13 May 1999, the Constitutional Court dismissed the application, finding the author's argument that the judgement could have gone in her favour had her request been granted unconvincing.

2.7 The author submitted two clinical reports, dated July and August 2002 respectively, attesting to a serious visual impairment that prevents her from engaging in some occupational, social and personal activities.

The complaint

3. The author contends that article 14, paragraph 1, of the Covenant has been violated. She maintains that she was prevented from producing a decisive piece of evidence, in breach of the principle of equality between the parties in court proceedings. If the ophthalmologist, who worked in the public health system, had been summoned, there would have been two different opinions from two specialists concerning the same facts, and since the expert she had proposed was a public health service official his impartiality could not have been doubted and the judgement would have been different. According to the author, the crux of the matter was whether the injury had had a delayed effect and the problem was that the court had allowed the testimony of an expert hired by the defendant but refused to summon the expert she herself had proposed. She adds that the court, in order to give the impression that its decision was a fair one, gave probative value to the statement by the emergency doctor in the health centre to which she had gone for the first time on 2 August 1993, stating that her injury was approximately 20 days old, but refused to admit as evidence the report of the expert proposed by her stating that the injury had occurred a month previously. Lastly, she states that the issue at stake is the same as that addressed in the Committee's decision concerning communication No. 846/1999 (*Jansen-Gielen v. The Netherlands*), in which the Committee found a violation of article 14, paragraph 1, of the Covenant, "in the absence of the guarantee of equality of arms between the parties in the production of evidence for the purposes of the hearing".[1]

The State party's submission on the admissibility and merits of the communication, and the author's comments thereon

4.1 With regard to the admissibility of the communication, the State party maintains that the author has not exhausted domestic remedies. It states that when the employment tribunal rejected the author's request that the ophthalmologist who had operated on her should be summoned as an expert witness, she could have appealed against that decision, as she is entitled to do under article 184 of the Labour Procedure Act. She did not file an appeal. Secondly, when the defendant's expert gave testimony during the proceedings, the author or her counsel could have objected. She did not do so. Thirdly, when the proceedings ended, the author could have requested that judgement be deferred pending the appearance of the ophthalmologist as an expert witness, under article 95 of the Labour Procedure Act. She did not do so. Fourthly, in her application to the High Court for reconsideration, the author could have requested that the same ophthalmologist be summoned to give expert evidence, as authorized under article 191 of the Labour Procedure Act, but she did not do so.

4.2 With regard to the merits, the State party reports that the author suffered from congenital myopia magna and wore hard contact lenses. She worked as a packer in a lemon-packing firm from 11 January 1993 to 10 July 1993 and duly signed the document ending her employment contract. On 2 August 1993, a month after finishing work, she went to a health centre with a pain in her right eye. The report of the emergency doctor who treated her states that the author presented a traumatism dating back 20 days. The author went into hospital the next day and was operated on for a detached retina; the medical report states that she presented a traumatism dating back a month. Two-and-a-half months after terminating her employment contract, the author reported to the Labour Inspectorate that she had been struck in the right eye by a lemon on 2 July 1993 while working. The Labour Inspectorate reported that there was no proof of an occupational accident, that there was no accident declaration and that the section supervisor stated that the author had never said that she had been struck in the eye. A year after the alleged blow from the lemon, the author applied to a labour court to have the alleged blow from the lemon declared an occupational accident.

4.3 The State party contends that the author failed to prove to the domestic courts the fact of the injury (being struck by a lemon while working) and its alleged consequence (detachment of the retina). During the proceedings, the author was unable to prove that she had been struck in the right eye by a lemon. The supervisor of the section where she worked denied it, and the two witnesses produced by the author contradicted each other. One asserted that he had thrown a lemon at a box from four or five metres away, while the other said that the lemon was thrown from a distance of one metre to where the author was. With regard to the evidence of the alleged consequence, the author's request that the ophthalmologist should be summoned was submitted after the statutory time limit had passed, two days before the hearing, while the law requires requests for evidence to be submitted three days in advance. The author did not appeal against the rejection of her request, probably because the report of the doctor concerned was in the case file. During the proceedings, the author neither objected to nor contested the report of the expert put forward by the defence. The judge considered that neither the blow from the lemon nor the consequence of a detached retina had been proved. The assessment of the evidence by the judge was not arbitrary. He took into account, inter alia, the time that had elapsed before the author went to the health centre, the different dates indicated as the probable date of the accident by the emergency doctor and the ophthalmologist who operated on the author (20 days before 2 August 1993 for the former and 30 days before 3 August 1993 for the latter) and the fact that the alleged blow from the lemon is not mentioned in the record of the first consultation, on 2 August 1993, but appears for the first time in the record dated 3 August 1993.

4.4 The State party contends that the author filed six different applications for review with the domestic courts and that all of these rejected her arguments. The High Court dismissed an application for reconsideration submitted by the author and concluded that if the fact of the injury was not itself proved, at least in relation to the work performed, it was impossible to classify the retinal detachment as an occupational accident. The Court took into account the fact that the author had completed her employment contract on 10 July 1993 and had received her final salary but had never informed the company that she had been struck by a lemon on 2 July 1993, and that it was some time after the alleged accident that she had gone to a health centre. Her appeal for unification of doctrine was rejected by the Supreme Court because the author did not provide proof of a previous or earlier judgement that differed from the one in her case. Her application to the Supreme Court for a judicial review was rejected because she could have submitted the "new" document on which she based her case at an earlier stage. The author subsequently filed a new application for reconsideration and it too was rejected. Lastly, her application to the Constitutional Court for *amparo* was also rejected. With regard to the fact that the doctor proposed by the author did not testify as an expert, the Court did not consider that the need for him to do so had been demonstrated, nor that the author would have obtained a favourable judgement as a result of his testimony.

4.5 With regard to the medical reports dating from 2002 submitted by the author as evidence of the serious visual impairment that prevented her from leading a normal life, the State party stresses that during the proceedings the author was unable to prove that she had been struck by a lemon. The State party produced various documents relating to the proceedings. In the particulars of her claim, the author only announced that she would use documentary evidence and witnesses. However, two days before the first hearing, she requested the summons of witnesses. The judge suspended the hearing and ordered that a request for information be sent to the Labour Inspectorate, which reported that there was no record of the occupational accident and that the author had not reported having received a blow to the right eye on 2 July 1993. A second hearing was scheduled and the witnesses proposed by the author summoned; they could not, however, be served with notice. The author provided new addresses for the witnesses and for the first time requested that the ophthalmologist who had operated on her be summoned. The defendant supplied three medical reports. During the course of the second hearing, the principle of the adversarial procedure was respected and the judge provided adequate grounds for the judgement.

5.1 In a note dated 11 May 2003, the author states that the State party's claim that domestic remedies had not been exhausted is being raised for the first time before the Committee without having been put before any of the domestic courts. The author considers that the State party is abusing the legal process by introducing a claim that was not raised before the domestic courts. She considers that it was unnecessary to appeal against the decision of the employment tribunal to reject her request to have the ophthalmologist summoned, since when the Constitutional Court rejected her application for *amparo*, it gave a ruling on the merits of the case, stating that the author's right to use means of proof had not been infringed because, by not having argued convincingly that the final judicial decision could have been in her favour had her request been acceded to, she had not demonstrated that she was left without a defence, as she alleged. One of the formal requirements for filing an application for *amparo* before the Constitutional Court is to have exhausted judicial remedies, and the author had referred to the violation of her right to use means of proof in the application for reconsideration before the High Court. The author denies that the other remedies referred to by the State party are effective or were available to her.

5.2 With regard to the merits, the author maintains that since her lawsuit concerned an eye injury and its relation to a traumatic event, the importance of summoning the ophthalmologist who had operated on her was obvious. The importance of expert testimony could be seen in the fact that the judge had indeed listened to the testimony of the expert proposed by the defendant and assigned decisive weight to it in his judgement. The author concludes that her right to equality before the courts was infringed because she was unable to submit evidence on the same terms as the defendant.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has considered all the information provided by the author and the State party, from which it may be inferred that the author was not left without a defence, since although the ophthalmologist who operated on her was not summoned to the hearing, the author was not prevented from submitting the report and having it included in the court record. Moreover, whereas the defendant was not able to cross-question her ophthalmologist, the author had the opportunity to cross-question the expert proposed by the defendant. The Committee observes that the report dated 3 August 1993 referred to by the author is not consistent with the report of 2 August 1993 by the emergency doctor in the health centre to which the author went, which put the probable date of the accident at approximately 20 days previously, i.e. after the author's employment had ended. The Committee also observes that the judge who considered the case explained in his judgement the reasons why he believed that it had not been proven that the injury sustained by the author was work-related. The Committee recalls its jurisprudence to the effect that it is for the courts of States parties to assess the facts and the evidence, unless the assessment is manifestly arbitrary or constitutes a denial of justice,[2] neither of which circumstances applies in this case. The Committee finds that the author has not sufficiently substantiated, for the purpose of admissibility, her complaint of an alleged violation of article 14, paragraph 1, of the Covenant, and that her complaint is therefore inadmissible under article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol; and

(b) That this decision shall be communicated to the State party, the author of the communication and her lawyer.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian, as part of the Committee's annual report to the General Assembly.]

Notes

[1] Communication No. 846/1999, *Jansen-Gielen v. The Netherlands*, decision of 3 April 2001, para. 8.2.

[2] Communication No. 986/2001, *Semey v. Spain*, decision of 30 July 2003, para. 8.6

P. Communication No. 1118/2002, *Deperraz v. France*
(Decision adopted on 17 March 2005, eighty-third session)*

Submitted by:	Jean-Louis Deperraz and his wife, Geneviève Delieutraz (represented by counsel, Mr. Alain Lestourneau)
Alleged victim:	The authors
State party:	France
Date of communication:	11 October 2000 (initial submission)
Subject matter:	Irregularities in the judicial procedure for winding up two companies
Procedural issues:	Inadmissibility *ratione materiae* - non-exhaustion of domestic remedies
Substantive issues:	Right to a fair and public hearing - right to be tried without undue delay
Articles of the Covenant:	14, paragraphs 1 and 3 (c)
Articles of the Optional Protocol:	2 and 5, paragraph 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 17 March 2005,

Adopts the following:

Decision on admissibility

1. The authors of the communication are Jean-Louis Deperraz and his wife, Geneviève Delieutraz, both French nationals. They claim to be the victims of violations by France of article 14 of the International Covenant on Civil and Political Rights. They are represented by counsel, Mr. Alain Lestourneau.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Under rule 90 of the Committee's rules of procedure, Ms. Christine Chanet did not participate in the Committee's consideration of the case.

Factual background

2.1 The authors were the owners of a limited company, SARL Deperraz Electricité, and of a property investment partnership, SCI Le Praley. The former carried out electrical installations; the latter was formed by the Deperraz, who had married under the separation of property regime, for the purpose of purchasing and managing all their property, including the premises from which Deperraz Electricité was run.

2.2 On 6 November 1985, pursuant to a petition from a supplier for payment of a disputed bill, the Bonneville Regional Court ordered Deperraz Electricité to be wound up. One of the company's employees entered a third-party challenge to this ruling in an attempt to show that the company was not insolvent. In a ruling of 18 December 1985, the same Court found that insolvency had not been formally established and retracted its earlier judgement.

2.3 However, the winding-up order had had an adverse effect on the company: court decisions of this kind are subject to provisional execution, with the result in this case that, among other things, all the company's employees left forthwith, all work in progress came to a halt, the entire customer base was lost and suppliers stopped delivering. On 18 April 1990, the same Court ordered the company's affairs to be administered under court supervision, this time pursuant to a petition from the *Union de recouvrement des cotisations de sécurité sociale et d'allocations familiales* (URSSAF) - the agency responsible for recovering social security contributions and family allowances - and the tax authorities. On its own motion, the Court also ordered Le Praley's affairs to be administered under court supervision. That decision, according to the authors, was taken without notification of the proceedings or the presence in court of the company's legal representative, and furthermore the judgement was not duly served upon the company. The two companies subsequently went into liquidation by order of the same Court on 22 May 1991.

2.4 Le Praley appealed against this judgement on the grounds that it had never been legally merged with Deperraz Electricité. By a ruling of 7 April 1992, the Chambéry Appeal Court found that the Regional Court, of its own motion and contrary to the law, had ordered Le Praley's affairs to be administered under court supervision in proceedings to which the company itself had not been a party. Consequently, the Court struck down the rulings relating to Le Praley. It made no ruling, however, on the merits of the case, namely the question of the merger of the two companies.

2.5 On 5 January 1993, the official receiver for Deperraz Electricité petitioned the Regional Court for the winding-up order to include Le Praley, on the grounds that the two companies had merged, and for Mr. Deperraz to be ordered to cover the debts personally, on the grounds that, among other things, he had continued to run the business at a loss. On 7 October 1993, in a telephone call from the court registry, the authors' counsel was informed that the Court had handed down a judgement the previous day rejecting this application. However, he never received a written copy of the judgement referred to by the Registrar.

2.6 In February 1994, counsel was informed that the hearings were to reopen. He wrote to the President of the Court objecting to the proceedings, on the grounds that the 6 October ruling could be challenged only by appeal. The authors claim this situation arose because the President of the Court who handed down the 6 October 1993 ruling failed to record it in writing and has now moved to another court.

2.7 In a fresh ruling on 7 September 1994, the reconstituted Court found that the two companies had been merged and issued a winding-up order against Le Praley. In a second ruling that same day, the Court found that the debts of Deperraz Electricité were the result of a series of management errors and ordered Mr. Deperraz to pay the official receiver the sum total of the company's debts.

2.8 SCI Le Praley and Mr. Deperraz appealed these rulings in the Chambéry Appeal Court. Le Praley's principal argument was that proceedings against it were blocked by the Appeal Court's own previous ruling of 7 April 1992, which had the force of *res judicata*. The Appeal Court, however, upheld the rulings in two separate decisions on 24 September 1996. In respect of the judgement against Le Praley, it found that the force of *res judicata* attaching to its 7 April 1992 ruling applied only insofar as that ruling struck down the Regional Court's ruling of 22 May 1991, and did not prevent the official receiver from applying for a winding-up order against Le Praley.

2.9 The authors challenged these rulings in the Court of Cassation on the following grounds:

- As to the Appeal Court's decision to uphold the liquidation of Le Praley, they maintain that this was based on a ground raised by the Court of its own motion and without seeking the views of the parties, in violation of the right to a defence and the principle of adversarial proceedings. They also claim that the Court applied the wrong criteria in concluding that the companies had merged;

- As to the judgement against Mr. Deperraz, they contend that the Appeal Court ruled of its own motion on a charge of mismanagement not raised in the originating claim and not substantiated in law, in violation of the right to a defence and the principle of adversarial proceedings.

2.10 The Court of Cassation rejected these challenges in rulings handed down on 6 July 1999.

The complaint

3.1 The authors claim a violation on several counts of article 1, paragraph 14, of the Covenant, separately and in conjunction with article 5, paragraph 2 (b), of the Optional Protocol. In their view, the various proceedings taken against them constitute an indivisible whole which relates to the same events, and the case should therefore be considered as a whole in the light of the Covenant. They state that they have exhausted all domestic remedies.

3.2 With regard to article 14, paragraph 1, of the Covenant, the authors consider that they were not given a fair and public hearing insofar as:

- The erroneous winding-up of Deperraz Electricité under the 6 November 1985 judgement constituted a major miscarriage of justice that destroyed the business. The 18 December 1985 retraction did not remedy the effects of that judgement, which had been provisionally executed;

- The placing of Le Praley's affairs under court supervision, ordered on 18 April 1990, was also a miscarriage of justice since the law was not followed. The Appeal Court struck it down as contrary to public policy in its final judgement of 7 April 1992. Yet on 24 September 1996 the same Court ruled, ex parte and unfairly, that Le Praley should also be wound up;

- The 6 October 1993 judgement was not recorded in writing but existed nonetheless. The reconstituted Court had no right to hand down two rulings contradicting the first on the grounds that the first had not been recorded in writing by the previous President;

- Mr. Deperraz had been unjustly ordered to pay the debts of Deperraz Electricité on a ground raised by the Court of its own motion, namely an issue of mismanagement that was considered ex parte and was not mentioned in the originating claim;

- Contrary to the requirements of the Covenant, the contested proceedings were not conducted in public, which could not be reasonably justified by the nature of the case.

3.3 The authors claim that the proceedings as a whole have lasted nearly 15 years (1985-2000) and that successive miscarriages of justice have contributed to this unreasonably lengthy process. This, they maintain, is a violation of article 14, paragraph 1, taken in conjunction with article 5, paragraph 2 (b), of the Optional Protocol.

3.4 The authors also state that the communication has not been examined under another procedure of international investigation or settlement.

The State party's observations

Observations on admissibility

4.1 In a note verbale dated 6 January 2002, the State party submitted its comments on the admissibility of the communication.

4.2 With regard to the lack of a fair hearing, the State party contests the admissibility of this allegation and maintains that the authors are in effect attempting to challenge decisions handed down by the domestic courts that have in every case been extensively and closely argued. Furthermore, the authors did not appeal against some of the decisions they now criticize, namely those of 6 November 1985 and 18 April 1990. As to the proceedings relating to the recovery of the debt, the authors claim that the sentence was based on a ground raised by the Appeal Court of its own motion. Yet the Court of Cassation found that that ground had been discussed in the Appeal Court. The Committee has repeatedly stated that it may not consider facts or evidence submitted to the domestic courts unless it is clear that their evaluation was arbitrary or amounted to a denial of justice.

4.3 As to the lack of a public hearing, the State party contends that the authors at no time brought such a complaint before the Court of Cassation. Consequently, domestic remedies have not been exhausted.

4.4 As to the complaint of unreasonably lengthy proceedings, the State party considers that the authors have not exhausted all domestic remedies. In the first place, they have not availed themselves of the remedy provided under article L 781-1 of the Judicial Code, which stipulates: "The State is required to make good any damage caused by the improper administration of justice. Such liability is incurred only in the event of gross negligence or a denial of justice." The European Court of Human Rights has recognized the effectiveness of the remedy provided under this article, which may reasonably be used to challenge the length of any civil or criminal proceedings. The State party requests the Committee to endorse the European Court's case law in this regard.

4.5 Furthermore, the authors did not raise the issue of the length of the proceedings in the domestic courts and in particular before the Court of Cassation. In this regard, the State party recalls the Committee's decision on communication No. 661/1995,[1] in which it found the claim that the examination of the case and the judicial proceedings were unreasonably lengthy inadmissible on the grounds that the author had not brought that complaint before the Court of Cassation.

Observations on the merits

4.6 On 14 April 2003, the State party submitted its comments on the merits of the complaint.

4.7 As to the lack of a fair hearing, and with reference to the miscarriages of justice alleged by the authors, in the State party's view an error by a court does not constitute a culpable miscarriage of justice within the meaning of article 14 of the Covenant, to the extent that it arises in the course of a judicial process that also allows for its rectification. Thus the error of judgement made by the Court in its ruling of 6 November 1985 was promptly put right and the authors produce no evidence of the alleged harm suffered, namely the total loss of their business. The Appeal Court ruling of 7 April 1992 struck down the 18 April 1990 judgement on the grounds that the lower court had of its own motion ordered Le Praley's affairs to be placed under court supervision, despite the fact that Le Praley was not itself a party to the proceedings. The 4 September 1996 judgement was handed down in different proceedings and, contrary to the authors' claim, did not reinstate a decision that had, in any event, been struck down only because of a procedural irregularity.

4.8 The authors have provided no real evidence of the existence of the alleged judgement to which they refer, dated 6 October 1993 and supposedly in their favour. It is, moreover, surprising that they waited until they were informed by the court registry that hearings were to resume before making inquiries about the 6 October 1993 judgement.

4.9 As to the action to recover the debt and the contention that Mr. Deperraz was sentenced on a ground raised by the Appeal Court of its own motion, namely an issue of mismanagement that was not examined in adversarial proceedings and not mentioned in the originating claim, the State party points out that the parties discussed the question of mismanagement in court and Mr. Deperraz deemed it unnecessary to reply to the summons to appear in court to explain in person the mismanagement for which he was blamed.[2] The Appeal Court did indeed take a different view of that mismanagement from that of the lower court, but it did so on the basis of points raised in the course of the hearings which had thus previously been discussed by the parties, namely an examination of the accounts and the fact that they did not balance. This was confirmed by the Court of Cassation.

U. Communication No. 1119/2002, *Lee v. The Republic of Korea* (Views adopted on 20 July 2005, eighty-fourth session)*

Submitted by:	Mr. Jeong-Eun Lee (represented by counsel, Mr. Seung-Gyo Kim)
Alleged victim:	The author
State party:	Republic of Korea
Date of communication:	23 August 2002 (initial submission)
Subject matter:	Conviction of complainant under National Security Law for membership in "anti-State organization"
Procedural issues:	Substantiation of claims by author - Exhaustion of domestic remedies - Applicability of State party's reservation to article 22 of the Covenant
Substantive issues:	Freedom of thought and conscience - Freedom of opinion - Freedom of expression - Permissibility of restrictions on freedom of association - Right to equality before the law and to equal protection of the law
Articles of the Covenant:	18 (1), 19 (1) and (2), 22 and 26
Articles of the Optional Protocol:	2 and 5 (2) (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 20 July 2005,

Having concluded its consideration of communication No. 1119/20002, submitted to the Human Rights Committee on behalf of Mr. Jeong-Eun Lee under the Optional Protocol to the International Covenant on Civil and Political Rights,

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Having taken into account all written information made available to it by the author of the communication,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Mr. Jeong-Eun Lee, a citizen of the Republic of Korea, born on 22 February 1974. He claims to be a victim of violations by the Republic of Korea[1] of articles 18, paragraph 1, 19, paragraphs 1 and 2, 22, paragraph 1, and 26 of the International Covenant on Civil and Political Rights ("the Covenant"). He is represented by counsel, Mr. Seung-Gyo Kim.

Factual background

2.1 In March 1993, the author began his studies at the faculty of architecture of Konkuk University. In his fourth year, he was elected Vice-President of the General Student Council of Konkuk University. As such, he automatically became a member of the Convention of Representatives, the highest decision-making body of the Korean Federation of Student Councils (*Hanchongnyeon*), a nationwide association of university students established in 1993, comprising 187 universities (as of August 2002), including Konkuk University, and pursuing the objectives of democratization of Korean society, national reunification and advocacy of campus autonomy.

2.2 In 1997, the Supreme Court of the Republic of Korea ruled that *Hanchongnyeon* was an "enemy-benefiting group" and an anti-State organization within the meaning of article 7, paragraphs 1 and 3,[2] of the National Security Law, because the platform and activities of the fifth-year[3] *Hanchongnyeon* were said to support the strategy of the Democratic People's Republic of Korea (DPRK) to achieve national unification by "communizing" the Republic of Korea.

2.3 In 2001, the author became a member of the Convention of Representatives of the ninth year *Hanchongnyeon*. On 8 August 2001, he was arrested and subsequently indicted under article 7 of the National Security Law. By judgement dated 28 September 2001, the East Branch Division of the Seoul District Court sentenced him to one year imprisonment and a one-year "suspension of eligibility". His appeal was dismissed by the Seoul High Court on 5 February 2002. On 31 May 2002, the Supreme Court dismissed his further appeal.

2.4 The courts rejected the author's defence that the ninth year *Hanchongnyeon* had revised its platform to endorse the "June 15 North-South Joint Declaration" (2000) on national reunification agreed to by both leaders of North and South Korea and that, even if the programme of *Hanchongnyeon* was to some extent similar to North Korean ideology, this alone did not justify its characterization as an "enemy-benefiting group".

2.5 At the time of the submission of the communication, the author was serving his prison term at Gyeongju Correctional Institution.

The complaint

3.1 The author claims that his conviction for membership in an "enemy-benefiting group" violates his rights to freedom of thought and conscience (art. 18, para. 1), to freedom of opinion (art. 19, para. 1) and expression (art. 19, para. 2), to freedom of association (art. 22, para. 1), and to equality before the law and equal protection of the law (art. 26).

3.2 He submits that his conviction simply because he was a representative of *Hanchongnyeon* violated his right under article 18 to freedom of thought and conscience, since his membership in the association was based on his free will and conscience.

3.3 By reference to the Committee's jurisprudence,[4] the author argues that the fact that he was convicted for membership in an "enemy-benefiting group" also violated his rights under article 19 to hold opinions without interference and to freedom of expression, as his conviction was based on the organization's ideological inclination, rather than the actual activities of the ninth year *Hanchongnyeon*. He emphasizes that the Committee itself has criticized article 7 of the National Security Law as being incompatible with the requirements of article 19, paragraph 3.[5]

3.4 For the author, his right to freedom of association was breached because he was punished for joining *Hanchongnyeon* as an ex officio representative. Moreover, his conviction amounted to discrimination on the ground of political opinion, in violation of article 26, given that *Hanchongnyeon* had never carried out any activities that would have directly benefited the DPRK.

3.5 The author requests the Committee to recommend to the State party to rescind paragraphs 1 and 3 of article 7 of the National Security Law and that, pending annulment, these provisions should no longer be applied and that the author be acquitted through retrial and compensated for the damages sustained.

3.6 On admissibility, the author submits that the same matter is not being examined under another procedure of international investigation or settlement and that he has exhausted all available domestic remedies.

State party's observations on admissibility and merits

4.1 In its observations dated 8 May 2003, the State party only challenged the merits of the communication, arguing that the author's conviction under article 7, paragraphs 1 and 3, of the National Security Law was justified by the necessity to protect its national security and democratic order. It submits that, in accordance with the limitation clauses in articles 18, paragraph 3, 19, paragraph 3, and 22, paragraph 2, of the Covenant, article 37, paragraph 2, of the Constitution of the Republic of Korea provides that the freedoms and rights of citizens may be restricted by law for the protection of national security, maintenance of law and order, or public welfare. Article 7, paragraph 1 and 3, of the National Security Law, which had been enacted to protect national security and the democratic order against the threat posed by North Korea's revolutionary aim to "communize" the Republic of Korea, had repeatedly been declared compatible with the Constitution by the Supreme Court and the Constitutional Court.

The State party concludes that the author's conviction, in a fair trial before independent tribunals, based on the proper application of article 7, paragraphs 1 and 3, of the National Security Law, was consistent with both the Covenant and the Constitution.

4.2 The State party dismisses the author's defence that the ninth year *Hanchongnyeon* revised its agenda and that it could not be considered an anti-State organization, merely because some of its objectives resembled North Korean ideology. It argues that the organization's programme, rules and documents reveal that *Hanchongnyeon* is "benefiting an anti-State organization and endangering the national security and liberal democratic principles of the Republic of Korea".

4.3 Lastly, the State party denies that the author was discriminated against based on his political opinion. It submits that the laws of the Republic of Korea, including the National Security Law, were applied equally to all citizens. The author was not prosecuted because of his political opinion, but rather because his actions constituted a threat to society.

Committee's request for author's comments

5. On 13 May 2003, the State party's submission was sent to counsel for comments. No comments were received, despite three reminders dated 8 October 2003, 26 January and 13 July 2004.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with article 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for purposes of article 5, paragraph 2 (a), of the Optional Protocol, and that the author has exhausted domestic remedies, as required by article 5, paragraph 2 (b), of the Optional Protocol.

6.3 The Committee considers that the author has not substantiated, for purposes of admissibility, his claim that his conviction amounted to discrimination on the ground of his political opinion, in violation of article 26 of the Covenant. It follows that this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.4 As regards the alleged violation of article 22 of the Covenant, the Committee notes that the State party has referred to the fact that relevant provisions of the National Security Law are in conformity with its Constitution. However, it has not invoked its reservation *ratione materiae* to article 22 that this guarantee only applies subject "to the provisions of the local laws including the Constitution of the Republic of Korea". Thus, the Committee does not need to examine the compatibility of this reservation with the object and purpose of the Covenant and can consider whether or not article 22 has been violated in this case.

6.5 The Committee therefore declares the communication admissible insofar as it appears to raise issues under articles 18, paragraph 1, 19 and 22, of the Covenant.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

7.2 The issue before the Committee is whether the author's conviction for his membership in *Hanchongnyeon* unreasonably restricted his freedom of association, thereby violating article 22 of the Covenant. The Committee observes that, in accordance with article 22, paragraph 2, any restriction on the right to freedom of association to be valid must cumulatively meet the following conditions: (a) it must be provided by law; (b) it may only be imposed for one of the purposes set out in paragraph 2; and (c) it must be "necessary in a democratic society" for achieving one of these purposes. The reference to a "democratic society" indicates, in the Committee's view, that the existence and functioning of a plurality of associations, including those which peacefully promote ideas not favourably received by the government or the majority of the population, is one of the foundations of a democratic society. Therefore, the existence of any reasonable and objective justification for limiting the freedom of association is not sufficient. The State party must further demonstrate that the prohibition of the association and the criminal prosecution of individuals for membership in such organizations are in fact necessary to avert a real, and not only hypothetical danger to the national security or democratic order and that less intrusive measures would be insufficient to achieve this purpose.

7.3 The author's conviction was based on article 7, paragraphs 1 and 3, of the National Security Law. The decisive question which must therefore be considered is whether this measure was necessary for achieving one of the purposes set out in article 22, paragraph 2. The Committee notes that the State party has invoked the need to protect national security and its democratic order against the threat posed by the DPRK. However, it has not specified the precise nature of the threat allegedly posed by the author's becoming a member of *Hanchongnyeon*. The Committee notes that the decision of the Supreme Court of the Republic of Korea, declaring this association an "enemy-benefiting group" in 1997, was based on article 7, paragraph 1, of the National Security Law which prohibits support for associations which "may" endanger the existence and security of the State or its democratic order. It also notes that the State party and its courts have not shown that punishing the author for his membership in *Hanchongnyeon*, in particular after its endorsement of the "June 15 North-South Joint Declaration" (2000), was necessary to avert a real danger to the national security and democratic order of the Republic of Korea. The Committee therefore considers that the State party has not shown that the author's conviction was necessary to protect national security or any other purpose set out in article 22, paragraph 2. It concludes that the restriction on the author's right to freedom of association was incompatible with the requirements of article 22, paragraph 2, and thus violated article 22, paragraph 1, of the Covenant.

7.4 In the light of this finding, the Committee need not address the question whether the author's conviction also violated his rights under articles 18, paragraph 1, and 19 of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal a violation of article 22, paragraph 1, of the Covenant.

9. In accordance with article 2, paragraph 3, of the Covenant, the author is entitled to an effective remedy, including appropriate compensation. The Committee recommends that the State party amend article 7 of the National Security Law, with a view to making it compatible with the Covenant. The State party is under an obligation to ensure that similar violations do not occur in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, that State party has undertaken an obligation to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] The Covenant and the Optional Protocol thereto entered into force for the Republic of Korea on 10 July 1990. Upon ratification, the State party entered reservations/declarations: "The Government of the Republic of Korea [declares] that the provisions of paragraph 5 [...] of article 14, article 22 [...] of the Covenant shall be so applied as to be in conformity with the provisions of the local laws including the Constitution of the Republic of Korea."

[2] Article 7 (1) of the National Security Law reads: "Any person who praises, incites or propagates the activities of an anti-State organization, a member thereof, or a person who has received an order from it, or who acts in concert with it, or propagates or instigates a rebellion against the State, with the knowledge of the fact that it may endanger the existence and security of the State or democratic fundamental order, shall be punished by imprisonment for a term not exceeding seven years."

Article 7 (3) of the National Security Law reads: "Any person who forms or joins an organization aiming at the acts referred to in paragraph (1) shall be punished by imprisonment for a term of one year or more."

[3] The Convention of Representatives of *Hanchongnyeon* establishes committees on a yearly basis to carry out the organization's activities.

[4] The author refers to communications No. 628/1995, *Tae Hoon Park v. The Republic of Korea*, Views adopted on 20 October 1998, and No. 574/1994, *Keun-Tae Kim v. The Republic of Korea*, Views adopted on 3 November 1998.

[5] See concluding observations of the Human Rights Committee on the second periodic report of the Republic of Korea, 1 November 1999, at paras. 8-9.

V. Communication No. 1128/2002, *Marques v. Angola* (Views adopted on 29 March 2005, eighty-third session)*

Submitted by:	Rafael Marques de Morais (represented by the Open Society Institute and Interights)
Alleged victim:	The author
State party:	Angola
Date of communication:	5 September 2002 (initial submission)
Subject matter:	Arrest, detention and conviction of journalist for criticizing the Angolan President
Procedural issues:	State party's failure to cooperate - Substantiation of claims by author - Admissibility *ratione materiae* - Exhaustion of domestic remedies
Substantive issues:	Liberty and security of person - Right to be informed of reasons for arrest - Right to be brought promptly before a judge - Challenge of lawfulness of detention - Compensation for unlawful arrest or detention - Right to a fair trial - Liberty of movement - Freedom of speech
Articles of the Covenant:	9 (1) to (5), 14 (1), (3) (a), (b), (d), (e), and (5), 12 and 19
Articles of the Optional Protocol:	2, 3 and 5 (2) (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 29 March 2005,

Having concluded its consideration of communication No. 1128/2002, submitted to the Human Rights Committee on behalf of Rafael Marques de Morais under the Optional Protocol to the International Covenant on Civil and Political Rights,

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Rafael Marques de Morais, an Angolan citizen, born on 31 August 1971. He claims to be a victim of violations by Angola[1] of articles 9, 12, 14 and 19 of the International Covenant on Civil and Political Rights (the Covenant). The author is represented by counsel.

Factual background

2.1 On 3 July, 28 August and 13 October 1999, the author, a journalist and the representative of the Open Society Institute in Angola, wrote several articles critical of Angolan President *dos Santos* in an independent Angolan newspaper, the *Agora*. In these articles, he stated, inter alia, that the President was responsible "for the destruction of the country and the calamitous situation of State institutions" and was "accountable for the promotion of incompetence, embezzlement and corruption as political and social values."

2.2 On 13 October 1999, the author was summoned before an investigator at the National Criminal Investigation Division (DNIC) and questioned for approximately three hours before being released. In an interview later that day with the Catholic radio station, *Radio Ecclésia*, the author reiterated his criticism of the President and described his treatment by the DNIC.

2.3 On 16 October 1999, the author was arrested at gunpoint by 20 armed members of the Rapid Intervention Police and DNIC officers at his home in Luanda, without being informed about the reasons for his arrest. He was brought to the Operational Police Unit, where he was held for seven hours and questioned before being handed over to DNIC investigators, who questioned him for five hours. He was then formally arrested, though not charged, by the deputy public prosecutor of DNIC.

2.4 From 16 to 26 October 1999, the author was held incommunicado at the high security Central Forensic Laboratory (CFL) in Luanda, where he was denied access to his lawyer and family and was intimidated by prison officials, who asked him to sign documents disclaiming responsibility of the CFL or the Angolan Government for eventual death or any injuries sustained by him during detention, which he refused to do. He was not informed of the reasons for his arrest. On arrival at the CFL, the chief investigator merely stated that he was being held as a UNITA (National Union for the Total Independence of Angola) prisoner.

2.5 On or about 29 October 1999, the author was transferred to *Viana* prison in Luanda and granted access to his lawyer. On the same day, his lawyer filed an application for habeas corpus with the Supreme Court, challenging the lawfulness of the author's arrest and detention, which was neither acknowledged, nor assigned to a judge or heard by the Angolan courts.

2.6 On 25 November 1999, the author was released from prison on bail and informed of the charges against him for the first time. Together with the director, A. S., and the chief editor, A.J.F., of *Agora*, he was charged with "materially and continuously committ[ing] the crimes characteristic of defamation and slander against His Excellency the President of the Republic and the Attorney General of the Republic … by arts. 43, 46 all of Law no 22/91 of June 15 (the Press Law) with aggravating circumstances 1, 2, 10, 20, 21 and 25, all of articles 34 of the Penal Code." The terms of bail obliged the author "not to leave the country" and "not to engage in certain activities that are punishable by the offence committed and that create the risk that new violations may be perpetrated - Art 270 of the Penal Code". Several requests by the author for clarification of these terms were unsuccessful.

2.7 The author's trial began on 21 March 2000. After thirty minutes, the judge ordered the proceedings to continue in camera, since a journalist had tried to photograph the proceedings.

2.8 By reference to article 46[2] of Press Law No. 22/91 of June 15 1991, the Provincial Court ruled that evidence presented by the author to support his defence of the 'truth' of the allegations and the good faith basis upon which they were made, including the texts of speeches of the President, Government resolutions and statements of foreign State officials, was inadmissible. In protest, the author's lawyer left the courtroom, stating that he could not represent his client in such circumstances. When he returned to the courtroom on 25 March, the trial judge prevented him from resuming his representation of the author and ordered that he be disbarred from practising as a lawyer in Angola for a period of six months. The Court then appointed as ex officio defence counsel an official of the General Attorney's Office working at the Provincial Court's labour tribunal, who allegedly was not qualified to practise as a lawyer.

2.9 On 28 March 2000, a witness testifying on behalf of the author was ordered to leave the court and to stop his testimony after asserting that the law under which the author had been charged had was unconstitutional. The Court also refused to allow the author to call two other defence witnesses, without giving reasons.

2.10 On 31 March 2000, the Provincial Court convicted the author of abuse of the press[3] by defamation,[4] finding that his newspaper article of 3 July 1999, as well as the radio interview, contained "offensive words and expressions" against the Angolan President and, albeit not raised by the accusation and therefore not punishable, against the Attorney-General in their official and personal capacities. The Court found that the author had "acted with intention to injure" and based the conviction on the combined effect of articles 43, 44, 45 and 46 of Press Law No. 22/91, aggravated by item 1 of article 34 of the Penal Code (premeditation). It sentenced the author to six months' imprisonment and a fine of 1,000,000.00 Kwanzas (Nkz.) to "discourage" similar behaviour, at the same time ordering the payment of NKz. 100,000.00 compensatory damages to "the offended" and of a court tax of NKz. 20,000.00.

2.11 On 4 April 2000, the author appealed to the Supreme Court of Angola. On 7 April 2000, the Supreme Court issued a public notice criticizing the Bar Association for having qualified the trial judge's suspension of the author's lawyer as null and void for lack of jurisdiction, in a decision of its National Council adopted on 27 March 2000.[5]

2.12 On 26 October 2000, the Supreme Court quashed the trial court's judgement on the defamation count, but upheld the conviction for abuse of the press on the basis of injury[6] to the President, punishable by item No. 3 of article 45,[7] of Press Law No. 22/91. The Court considered that the author's acts were not covered by his constitutional right to freedom of speech, since the exercise of that right was limited by other constitutionally recognized rights, such as one's honour and reputation, or by "the respect that is due to the organs of sovereignty and to the symbols of the state, in this case the President of the Republic." It affirmed the prison term of six month, but suspended its application for a period of five years, and ordered the author to pay a court tax of NKz. 20,000.00 and NKz. 30,000.00 damages to the victim. The judgement did not refer to the pre-existing bail conditions imposed on the author.

2.13 On 11 November 2000, the author unsuccessfully sought to obtain a declaration confirming that his bail restrictions were no longer applicable.

2.14 On 12 December 2000, the author was prevented from leaving Angola for South Africa to participate in an Open Society Institute conference; his passport was confiscated. Despite repeated requests, his passport was not returned to him until 8 February 2001, following a court order of 2 February 2001 based on Amnesty Law 7/00 of 15 December 2000,[8] which was declared applicable to the author's case. Regardless of this amnesty, on 19 January 2002, the author was summoned to the Provincial Court and ordered to pay compensation of Nkz. 30,000 to the President, which he refused to pay, and legal costs, for which he paid.

The complaint

3.1 The author claims that his arrest and detention were not based on sufficiently defined provisions, in violation of article 9, paragraph 1, of the Covenant. In particular, article 43 of the Press Law on 'abuse of the press' and article 410 of the Criminal Code on 'injury' lacked specificity and were overly broad, making it impossible to ascertain what sort of political speech remained permissible. Moreover, the authorities relied upon different legal bases for the author's arrest and throughout the course of his subsequent indictment, trial and appeal. Even assuming that his arrest was lawful, his continued detention for a period of 40 days was neither reasonable nor necessary in the circumstances of his case.[9]

3.2 The author claims a violation of article 9, paragraph 2, as he was arrested without being informed of the reasons for his arrest or the charges against him. His 10-day incommunicado detention,[10] without access to his lawyer or family, the denial of his constitutional[11] right to be brought before a judge during the entire 40 days of his detention, and the authorities' failure to release him promptly pending trial, despite the absence of a risk of flight (as reflected by his cooperative attitude, e.g. when he reported to the DNIC on 13 October 1999), violated his rights under article 9, paragraph 3. The fact that he was prevented from challenging the lawfulness of his detention while detained incommunicado also violated article 9, paragraph 4, as did the Angolan courts' failure to address his habeas corpus application. Under article 9, paragraph 5, the author claims compensation for his unlawful arrest and detention.

3.3 The author contends that the exclusion of the press and the public from his trial was not justified by any of the exceptional circumstances enumerated in article 14, paragraph 1, since the disruptive photographer could have been deprived of his camera or excluded from the courtroom.[12]

3.4 The fact that the author did not receive the formal charges against him until 40 days after his arrest is said to violate his right under article 14, paragraph 3 (a), to be informed promptly of the nature and cause of the charge against him. He argues that this delay was not justified by the complexity of the case. Moreover, his conviction of more serious crimes (articles 43 and 45 of the Press Law) than the ones for which he was originally charged (articles 44 and 46 of the Press Law) breached his right to adequate facilities for the preparation of his defence (article 14, paragraph 3 (b), of the Covenant). His conviction on these additional charges should have been quashed by the Supreme Court, which instead held that a Provincial Court "may sentence a defendant for an infraction different from the one that he was accused of, even if it is more serious, provided that the grounds are facts included in the indictment or similar ruling".

3.5 The author claims that his right under article 14, paragraph 3 (b), to communicate with counsel was violated, as he could not consult his lawyer during incommunicado detention, at a critical state of the proceedings, and because the trial judge did not adjourn the trial upon disbarring the author's lawyer and appointing an ex officio defence counsel on 23 March 2000, thereby denying him adequate time to communicate with his new counsel. His right to defend himself through legal assistance of his own choosing (art. 14, para. 3 (d)) was breached because his lawyer was unlawfully removed from the case, as confirmed by the Supreme Court's judgement of 26 October 2000. He claims that, despite his willingness to pay for a counsel of his own choosing, a new counsel was appointed ex officio, who was neither qualified nor competent to provide adequate defence, limiting his interventions during the remainder of the trial to requesting the Court to "do justice" and to an expression of satisfaction with the proceedings.

3.6 For the author, the judge's decision to hear only one defence witness, a human rights activist who was expelled from court after claiming that article 46 of the Press Law was unconstitutional, and to reject documentary evidence of the truth of the author's statements, and the good faith basis on which they had been made, on the ground that article 46 of the Press Law precluded the presentation of evidence against the President, violated his rights under article 14, paragraph 3 (e), and denied him an opportunity to produce evidence on whether or not all the elements of the offence had been met, in particular whether he had acted with the intention of offending the President.

3.7 The author claims a violation of article 14, paragraph 5, because of the Supreme Court's lack of impartiality when it publicly criticized the Bar Association while his appeal was still pending, as well as by the lack of clarity as to the exact legal basis of his conviction, which prevented him from lodging a "meaningful" appeal.

3.8 The author contends that his critical statements about President dos Santos were covered by his right to freedom of expression under article 19, which requires that citizens be allowed to criticize or openly and publicly evaluate their Governments, as well as the ability of the press to express political opinion, including criticism of those who wield political power. His unlawful arrest and detention on the basis of his statements, the restrictions on his rights to free speech and movement pending trial, his conviction and sentence, and the threat that any expression of opinion may be punished by similar sanctions in the future constituted restrictions on his freedom of speech. He argues that these restrictions were not "provided by law" within the meaning of article 19, paragraph 3, given (a) that his unlawful detention and subsequent travel restrictions had no basis in Angolan law; (b) that his conviction was based on provisions such as article 43 of the Press Law ("abuse of the press") and article 410 of the Criminal Code ("injury"), which lacked the necessary clarity to qualify as "adequately accessible" and "sufficiently precise" norms, enabling an individual to foresee the consequences that his statements may entail; and (c) that the terms of his bail prohibiting him to "engage in certain activities that […] create the risk that new violations may be perpetrated" were equally unclear and that he had unsuccessfully requested clarification of the meaning of this restrictions.

3.9 The author denies that the restrictions imposed on him pursued a legitimate aim under article 19, paragraph 3 (a) and (b). In particular, respect of the rights or reputation of others (lit. a) could not be interpreted so as to protect a President from political, as opposed to personal, criticism, given that the aim of the Covenant is to promote political debate. Nor were the measures against him necessary or proportionate to achieve a legitimate purpose, considering (a) that the limits of acceptable criticism are wider regarding politicians as opposed to private individuals, who do not enjoy comparable access to effective channels of communication to counteract false statements; (b) that he was convicted for his statements without having had an opportunity to defend the factual basis of these statements or to establish the good faith basis on which they were made; and (c) that the use of criminal rather than civil penalties against him, in any event, constitutes a disproportionate means of protecting the reputation of others.

3.10 Lastly, the author claims a violation of article 12, which includes a right to obtain the necessary travel documents for leaving one's country. His prevention from leaving Angola on 12 December 2000 and the confiscation, without any justification, of his passport, which was withheld until February 2001, despite his repeated attempts to recover it and to clarify his legal entitlement to travel, had no legal basis, as the bail restrictions no longer applied and since the Supreme Court's judgement did not include any penalty inhibiting free movement. He contends that, in addition to article 12, these measures also violated his freedom of expression by precluding his participation in the conference organized by the Open Society Institute in South Africa.

3.11 The author claims that he same matter is not being examined under another procedure of international investigation or settlement and that he has exhausted domestic remedies, as he unsuccessfully tried to initiate habeas corpus proceedings to challenge the lawfulness of his arrest and detention and also appealed his conviction and sentence to the Supreme Court, the highest judicial authority in Angola.

3.12 The author seeks compensation for the alleged violations and requests the Committee to recommend that his conviction be quashed, that the State party clarify that there are no impediments to his freedom of movement, and that articles 45 and 46 of the Press Law be repealed.

State party's failure to cooperate

4. On 15 November 2002, 15 December 2003, 26 January 2004 and 23 July 2004, the State party was requested to submit to the Committee information on the admissibility and merits of the communication. The Committee notes that this information has still not been received. The Committee regrets the State party's failure to provide any information with regard to the admissibility or the substance of the author's claims. It recalls that it is implicit in article 4, paragraph 2, of the Optional Protocol that States parties examine in good faith all the allegations brought against them, and that they make available to the Committee all information at their disposal. In the absence of a reply from the State party, due weight must be given to the author's allegations, to the extent that they are substantiated.

Issues and proceedings before the Committee

Consideration of admissibility

5.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with article 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

5.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a), of the Optional Protocol.

5.3 With regard to the author's allegation that the press and the public were excluded from his trial, in violation of article 14, paragraph 1, the Committee notes that the author did not raise this issue before the Supreme Court. It follows that this part of the communication is inadmissible under articles 2 and 5, paragraph 2 (b), of the Optional Protocol.

5.4 Insofar as the author claims that he was not apprised of the formal charges against him until 40 days after his arrest, the Committee recalls that article 14, paragraph 3 (a), of the Covenant does not apply to the period of remand in custody pending the result of police investigations,[13] but requires that an individual be informed promptly and in detail of the charge against him, as soon as the charge is first made by a competent authority. Although the author was formally charged on 25 November 1999, that is, one week after the indictment had been "approved" by the prosecution, he did not raise this delay on appeal. The Committee therefore concludes that this part of the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

5.5 As to the claim that the conviction of more serious crimes than the ones charged by the prosecution violated the author's right under article 14, paragraph 3 (b), the Committee has noted the argument, in the Supreme Court's judgement of 26 October 2000, that a judge may convict a defendant of a more serious offence than the one that he was accused of, as long as the conviction is based on the facts described in the indictment. It recalls that it is generally for the national courts, and not for the Committee, to evaluate the facts and evidence in a particular case, or to review the interpretation of domestic legislation, unless it is apparent that the courts' decisions are manifestly arbitrary or amount to a denial of justice. The Committee considers that the author has not adequately substantiated that there was any absence of fair notice of the charges confronting him, nor has he otherwise substantiated any defects in relation to the Supreme Court's finding that a judge is not bound by the prosecution's legal evaluation of the facts as included in the indictment. Accordingly, this part of the communication is inadmissible under article 2 of the Optional Protocol.

5.6 As regards the author's claim that article 14, paragraph 3 (b), was also violated because the trial judge did not adjourn the trial after having replaced his lawyer by an ex officio counsel, thereby denying him adequate time to consult with his new counsel to prepare his defence, the Committee notes that the material before it does not reveal that the author, or his new counsel, requested an adjournment on grounds of insufficient time to prepare the defence. If counsel felt that they were not properly prepared, it was incumbent on him to request the adjournment of the trial.[14] In this respect, the Committee refers to its jurisprudence that a State party cannot be held responsible for the conduct of a defence lawyer, unless it was, or should have been, manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice.[15] It considers that the author has not substantiated, for purposes of admissibility, that failure to adjourn the trial was manifestly incompatible with the interests of justice. Accordingly, this part of the communication is inadmissible under article 2 of the Optional Protocol.

5.7 As to the author's claim that his right to defend himself through legal assistance of his own choosing (art. 14, para. 3 (d)) was breached, the Committee notes that the Supreme Court, while annulling the temporary suspension of the author's lawyer, did not pronounce itself on the legality of the lawyer's removal from the trial. On the contrary, it held that the abandonment of a client by a lawyer, outside situations specifically allowed by law, was subject to disciplinary sanctions under applicable regulations. In its public notice, the Supreme Court, instead of defending the judge's decision to debar the author's lawyer, expressed its concern about the effects of the Bar Associations criticism (causing "an unjustly suspicious climate [...] discrediting [the judiciary] both domestically and abroad"), while emphasizing that the trial judge's decision "may be cured by a higher court in the legal process". The Supreme Court subsequently declared the author's lawyer's six-month suspension null and void. Similarly, it does not transpire from the trial transcript that counsel was appointed against the author's will or that he limited his interventions during the remainder of the trial to redundant pleadings. According to the transcript, the author, when asked whether he intended to designate a new legal representative, declared that he would leave such decision to the Court. The Committee concludes that the author has not substantiated, for purposes of admissibility, that the removal of his lawyer from the trial was unlawful or arbitrary, that counsel was appointed against the author's will, or that he was unqualified to provide effective legal representation. Accordingly, this part of the communication is inadmissible under article 2 of the Optional Protocol.

5.8 With respect to the alleged violation of article 14, paragraph 3 (e), by the trial judge's decision to admit only one defence witness, who was expelled from the court after criticizing article 46 of the Press Law as unconstitutional, the Committee notes that it does not transpire from the Supreme Court's judgement of 26 October 2000, or from any other document at its disposal, that the author raised this claim on appeal. Consequently, this part of the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol for failure to exhaust domestic remedies.

5.9 While noting that the author based his appeal, inter alia, on the fact that the trial judge had rejected the documentary evidence presented by him in defence of the truth of his statements, the Committee notes that it is in principle beyond its competence to determine whether national courts properly evaluate the admissibility of evidence, unless it is apparent that their decision is manifestly arbitrary or amounts to a denial of justice. In the instant case, the Committee notes that the Provincial Court and, in particular, the Supreme Court examined whether the Press Law lawfully precludes the defence of the truth in relation to statements concerning the Angolan President, and it finds no evidence that their findings suffered from the above defects. It therefore considers that the author has not substantiated this part of his claim under article 14, paragraph 3 (e), for purposes of admissibility, and concludes that this part of the communication is inadmissible under article 2 of the Optional Protocol.

5.10 As regards the author's claim that his right under article 14, paragraph 5, was violated because of the lack of clarity about the legal basis for his conviction by the Provincial Court, and because the Supreme Court's impartiality was undermined by its public notice of 7 April 2000, the Committee observes that the crime of which the author was convicted (abuse of the press by defamation) is described with sufficient clarity in the Provincial Court's judgement. The Committee therefore concludes that the author has not sufficiently substantiated his claim, for purposes of admissibility, and that this part of the communication is inadmissible under article 2 of the Optional Protocol.

5.11 As to the remainder of the communication, the Committee considers that the author has sufficiently substantiated his claims for purposes of admissibility.

5.12 On the issue of exhaustion of domestic remedies, the Committee notes that the author raised the substance of his claims under article 9 in his application for habeas corpus, which, according to him, was never adjudicated by the Angolan courts. As regards the author's claim under article 19 of the Covenant, the Committee notes that he invoked "the right of political and social criticism and of the freedom of the press" on appeal. It furthermore notes the author's claim (in relation to article 12 of the Covenant) that he "took repeated legal measures to recover his passport and [to] clarify, legally, his entitlement to travel but was hampered by complete lack of access to information regarding his travel documents", and observes that, in the circumstances, no domestic remedies were available to the author.

5.13 In the absence of any information from the State party to the contrary, the Committee concludes that the author has met the requirements of article 5, paragraph 2 (b), of the Optional Protocol, and that the communication is admissible, insofar as it appears to raise issues under articles 9, paragraphs 1 to 5, 12, 14, paragraph 3 (b) (inasmuch as author's inability to have access to counsel during his incommunicado detention is concerned), and 19 of the Covenant.

Consideration of the merits

6.1 The first issue before the Committee is whether the author's arrest on 16 October 1999 and his subsequent detention until 25 November 1999 were arbitrary or otherwise in violation of article 9 of the Covenant. In accordance with the Committee's constant jurisprudence,[16] the notion of "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law. This means that remand in custody must not only be lawful but reasonable and necessary in all the circumstances, for example to prevent flight, interference with evidence or the recurrence of crime. No such element has been invoked in the instant case. Irrespective of the applicable rules of criminal procedure, the Committee observes that the author was arrested on, albeit undisclosed, charges of defamation which, although qualifying as a crime under Angolan law, does not justify his arrest at gunpoint by 20 armed policemen, nor the length of his detention of 40 days, including 10 days of incommunicado detention. The Committee concludes that in the circumstances, the author's arrest and detention were neither reasonable nor necessary but, at least in part, of a punitive character and thus arbitrary, in violation of article 9, paragraph 1.

6.2 The Committee notes the author's uncontested claim that he was not informed of the reasons for his arrest and that he was charged only on 25 November 1999, 40 days after his arrest on 16 October 1999. It considers that the chief investigator's statement, on 16 October 1999, that the author was held as a *UNITA* prisoner, did not meet the requirements of article 9, paragraph 2. In the circumstances, the Committee concludes that there has been a violation of article 9, paragraph 2.

6.3 As regards the author's claim that he was not brought before a judge during the 40 days of detention, the Committee recalls that the right to be brought "promptly" before a judicial authority implies that delays must not exceed a few days, and that incommunicado detention as such may violate article 9, paragraph 3.[17] It takes note of the author's argument that his 10-day incommunicado detention, without access to a lawyer, adversely affected his right to be brought before a judge, and concludes that the facts before it disclose a violation of article 9, paragraph 3. In view of this finding, the Committee need not pronounce itself on the alleged violation of article 14, paragraph 3 (b).

6.4 As to the author's claim that, rather than being detained in custody for 40 days, he should have been released pending trial, in the absence of a risk of flight, the Committee notes that the author was not charged until 25 November 1999, when he was also released from custody. He was therefore not "awaiting" trial within the meaning of article 9, paragraph 3, before that date. Moreover, he was not brought before a judicial authority before that date, which could have determined whether there was a lawful reason to extend his detention. The Committee therefore considers that the illegality of the author's 40-day detention, without access to a judge, is subsumed by the violations of article 9, paragraphs 1 and 3, first sentence, and that no issue of prolonged pretrial detention arises under article 9, paragraph 3, second sentence.

6.5 As regards the alleged violation of article 9, paragraph 4, the Committee recalls that the author had no access to counsel during his incommunicado detention, which prevented him from challenging the lawfulness of his detention during that period. Even though his lawyer subsequently, on 29 October 1999, applied for habeas corpus to the Supreme Court, this application was never adjudicated. In the absence of any information from the State party, the Committee finds that the author's right to judicial review of the lawfulness of his detention (art. 9, para. 4) has been violated.

6.6 With respect to the author's claim under article 9, paragraph 5, the Committee recalls that this provision governs the granting of compensation for arrest or detention that is "unlawful" either under domestic law or within the meaning of the Covenant.[18] It recalls that the circumstances of the author's arrest and detention gave rise to violations of article 9, paragraphs 1 to 4, of the Covenant, and notes the author's uncontested argument that the State party's failure to bring him before a judge during his 40-day detention also violated article 38 of the Angolan Constitution. Against this background, the Committee deems it appropriate to deal with the issue of compensation in the remedial paragraph.

6.7 The next issue before the Committee is whether the author's arrest, detention and conviction, or his travel constraints, unlawfully restricted his right to freedom of expression, in violation of article 19 of the Covenant. The Committee reiterates that the right to freedom of expression in article 19, paragraph 2, includes the right of individuals to criticize or openly and publicly evaluate their Governments without fear of interference or punishment.[19]

6.8 The Committee refers to its jurisprudence that any restriction on the right to freedom of expression must cumulatively meet the following conditions set out in paragraph 3 of article 19: it must be provided for by law, it must serve one of the aims enumerated in article 19, paragraph 3 (a) and (b), and it must be necessary to achieve one of these purposes. The Committee notes that the author's final conviction was based on article 43 of the Press Law, in conjunction with section 410 of the Criminal Code. Even if it were assumed that his arrest and detention, or the restrictions on his travel, had a basis in Angolan law, and that these measures, as well as his conviction, pursued a legitimate aim, such as protecting the President's rights and reputation or public order, it cannot be said that the restrictions were necessary to achieve one of these aims. The Committee observes that the requirement of necessity implies an element of proportionality, in the sense that the scope of the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect. Given the paramount importance, in a democratic society, of the right to freedom of expression and of a free and uncensored press or other media,[20] the severity of the sanctions imposed on the author cannot be considered as a proportionate measure to protect public order or the honour and the reputation of the President, a public figure who, as such, is subject to criticism and opposition. In addition, the Committee considers it an aggravating factor that the author's proposed truth defence against the libel charge was ruled out by the courts. In the circumstances, the Committee concludes that there has been a violation of article 19.

6.9 The last issue before the Committee is whether the author's prevention from leaving Angola on 12 December 2000 and the subsequent confiscation of his passport were in violation of article 12 of the Covenant. It notes the author's contention that his passport was confiscated without justification or legal basis, as his bail restrictions no longer applied, and that he was denied access to information about his entitlement to travel. In the absence of any justification advanced by the State party, the Committee finds that the author's rights under article 12, paragraph 1, have been violated.

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal violations of article 9, paragraphs 1, 2, 3 and 4, and of articles 12 and 19 of the Covenant.

8. In accordance with article 2, paragraph 3, of the Covenant, the author is entitled to an effective remedy, including compensation for his arbitrary arrest and detention, as well as for the violations of his rights under articles 12 and 19 of the Covenant. The State party is under an obligation to take measures to prevent similar violations in the future.

9. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, that State party has undertaken to ensure all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] The Covenant and the Optional Protocol to the Covenant entered into force for the State party on 10 April 1992.

[2] Article 46 of the Press Law reads: "If the person defamed is the President of the Republic of Angola, or the head of a foreign State, or its representative in Angola, then proof of the veracity of the facts shall not be admitted."

[3] The crime of abuse of the press is defined as follows in article 43 of the Press Law: "(1) For purposes of this law, an abuse of the press shall be deemed to be any act or behavio[u]r that injures the juridical values and interests protected by the criminal code, effected by publication of texts or images through the press, radio broadcasts or television. (2) The criminal code is applicable to the aforementioned crimes as follows: (a) The court shall apply the punishment set forth in the incriminating legislation, which punishment may be aggravated pursuant to general provisions: (b) If the agent of the crime has not previously been found guilty of any abuse of the press, then the punishment of imprisonment may be replaced by a fine of not less than NKz. 20,000.00."

[4] Article 407 of the Criminal Code describes the crime of defamation as follows: "If one person defames another publicly, *de viva voce*, in writing, in a published drawing, or in any public manner, imputing to him something offensive to his hono[u]r and dignity, or reproduces this, then he shall be condemned to a prison term of up to four months and a fine […]."

[5] The translation of the Supreme Court's public notice reads, in pertinent parts: "It does not make sense, therefore, for a single courtroom incident, resulting from a decision handed down by the Judge in question in open court, a decision which may be cured by a higher court in the legal process, and which is subject to an inter-institutional decision, to have caused such an inflammatory and unnecessary public notice from the Bar Association, creating an unjustly suspicious climate and discrediting [the judiciary] both domestically and abroad, and causing distorted proclamations by individuals, institutions, and even governmental officials."

[6] The crime of injury is defined in article 410 of the Criminal Code: "The crime of injury, without imputation of any determined fact, if committed against any person publicly, by gestures, *de viva voce*, by published drawing or text, or by any other means of publication, shall be punished with a prison term of up to two months and a fine […]. In an accusation for injury, no proof whatsoever of the veracity of the facts to which the injury may refer shall be admissible."

[7] Article 45 No. 3 reads: "Providing the veracity of the facts of the offence, once admitted by the author, shall render it exempt from punishment. Otherwise, the violator would be punished as a slanderer and sentenced to a prison term of up to 2 years and the corresponding fine, in addition to damages to be determined by a court, but in no case less than NKz. 50,000.00."

[8] Amnesty Law 7/00 applies to "crimes against security which were committed […] within the sphere of the Angolan conflict, as long as its agents have presented themselves or may come to present themselves to the Angolan authorities […]."

[9] The author refers to communication No. 305/1988, *van Alphen v. The Netherlands*, Views adopted on 23 July 1990, at para. 5.8.

[10] By reference to communication No. 277/1988, *Terán Jijón v. Ecuador*, Views adopted on 26 March 1992, at para. 3, the author submits that incommunicado detention as such gives rise to a violation of article 9, paragraph 3, of the Covenant, since it negatively impacts on the exercise of the right to be brought before a judge.

[11] Article 38 of the Constitution of Angola provides: "Any citizen subjected to preventive detention shall be taken before a competent judge to legalize the detention and be tried within the period provided for by law or released."

[12] It appears that this issue was not however raised in the Supreme Court.

[13] See communication No. 253/1987, *Kelly v. Jamaica*, Views adopted on 8 April 1991, para. 5.8.

[14] See communication No. 349/1989, *Wright v. Jamaica*, Views adopted on 27 July 1992, at para. 8.4.

[15] See communications No. 980/2001, *Hussain v. Mauritius*, decision on admissibility adopted on 18 March 2002, at para. 6.3, and No. 618/1995, *Campbell v. Jamaica*, Views adopted on 20 October 1998, at para. 7.3.

[16] See communication No. 305/1988, *Van Alphen v. The Netherlands*, Views adopted on 23 July 1990, at para. 5.8; communication No. 458/1991, *Mukong v. Cameroon*, Views adopted on 21 July 1994, at para. 9.8; communication No. 560/1993, *A. v. Australia*, Views adopted on 3 April 1997, at para. 9.2.

[17] Communication No. 277/1988, *Terán Jijón v. Ecuador*, Views adopted on 26 March 1992, at para. 5.3.

[18] See communication No. 560/1993, *A. v. Australia*, Views adopted on 3 April 1997, at para. 9.5.

[19] See communications Nos. 422/1990, 423/1990 and 424/1990, *Aduayom et al. v. Togo*, Views adopted on 12 July 1996, at para. 7.4.

[20] See Human Rights Committee, general comment No. 25 [57], 12 July 1996, at para. 25.

W. Communication No. 1134/2002, *Gorji-Dinka v. Cameroon* (Views adopted on 17 March 2005, eighty-third session)*

Submitted by:	Fongum Gorji-Dinka (represented by counsel, Ms. Irene Schäfer)
Alleged victim:	The author
State party:	Cameroon
Date of communication:	14 March 2002 (initial submission)
Subject matter:	Right to self-determination of former British Southern Cameroon - Arbitrary detention of separatist leader - Conditions of detention - Denial of right to vote in elections
Procedural issues:	Admissibility *ratione temporis* and *ratione materiae* - Substantiation of claims by author - Exhaustion of domestic remedies
Substantive issues:	Right to self-determination - Liberty and security of person - Right of persons deprived of their liberty to be treated with humanity - Segregation of accused from convicted persons - Liberty of movement - Compensation for miscarriage of justice - Right to vote
Articles of the Covenant:	1 (1), 7, 9 (1), 10 (1) and (2), 12, 14 (6), 19 and 25 (b)
Articles of the Optional Protocol:	1, 2, 3 and 5 (2) (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 17 March 2005,

Having concluded its consideration of communication No. 1134/2002, submitted to the Human Rights Committee on behalf of Fongum Gorji-Dinka, under the Optional Protocol to the International Covenant on Civil and Political Rights,

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Mr. Fongum Gorji-Dinka, a national of Cameroon, born on 22 June 1930, currently residing in the United Kingdom. He claims to be victim of violations by Cameroon[1] of articles 1, paragraph 1; 7; 9 paragraphs 1 and 5; 10, paragraphs 1 and 2 (a); 12; 19; 24, paragraph 3; and 25 (b) of the Covenant. He is represented by counsel.[2]

Facts as submitted by the author

2.1 The author is a former President of the Bar Association of Cameroon (1976-1981), the *Fon*, or traditional ruler, of Widikum in Cameroon's North-West province, and claims to be the head of the exile government of "Ambazonia". His complaint is closely linked to events which occurred in British Southern Cameroon in the context of decolonization.

2.2 After World War I, the League of Nations placed all former German colonies under international administration. Under a League of Nations mandate, Cameroon was partitioned between Great Britain and France. After World War II, the British and French Cameroons became United Nations trust territories, the British part being divided into the United Nations trust territory of British Southern Cameroon ("Ambazonia") and the United Nations trust territory of British Northern Cameroon. The "Ambas" were a federation of sovereign but interdependent ethnocracies, each under a traditional ruler called "Fon". In 1954, they were unified in a modern parliamentary democracy, consisting of a House of Chiefs appointed from among the traditional leaders, a House of Assembly elected by universal suffrage, and a government led by a Prime Minister appointed and dismissed by the Queen of England.

2.3 French Cameroon achieved independence in 1960 as the Republic of Cameroon. While the largely Muslim British Northern Cameroon voted to join Nigeria, the largely Christian British Southern Cameroon, in a United Nations plebiscite held on 11 February 1961, voted in favour of joining a union with the Republic of Cameroon, within which Ambazonia would preserve its nationhood and a considerable degree of sovereignty. The United Kingdom allegedly refused to implement the plebiscite, fearing that the Ambazonian Prime Minister would come under communist influence and would nationalize the Cameroon Development Cooperation (CDC), in which Britain had invested £2 million. In exchange for a license to continue exploiting CDC, the United Kingdom allegedly "sold" Ambazonia to the Republic of Cameroon which then became the Federal Republic of Cameroon.

2.4 On 8 October 1981, the author was asked to secure bail for five Nigerian missionaries accused of disseminating the teachings of a sect without a government permit. At the police station, he was arrested and detained together with the missionaries. A few months later, he was charged with the offence of fabricating a fake permit for the sect to operate in Cameroon. Although the trial judge found, on the facts, that the author had not been in Cameroon when the offence was committed, he sentenced him to 12 months' imprisonment. The author's appeal was delayed until after he had served his prison term. Just before the hearing of his appeal, Parliament enacted Amnesty Law 82/21, thereby expunging his conviction. The author subsequently abandoned his appeal and filed for compensation for unlawful detention, but he never received a reply from the authorities.

2.5 As a result of the "subjugation" of Ambazonians, whose human rights were allegedly severely violated by members of the Franco-Cameroonian armed forces as well as militia groups, riots broke out in 1983, prompting Parliament to enact Restoration Law 84/01, which dissolved the union of the two countries. The author then became head of the "Ambazonian Restoration Council" and published several articles, which called on President Paul Biya of the Republic of Cameroon to comply with the Restoration Law and to withdraw from Ambazonia.

2.6 On 31 May 1985, the author was arrested and taken from Bamenda (Ambazonia) to Yaoundé, where he was detained in a wet and dirty cell without a bed, table or any sanitary facilities. He fell ill and was hospitalized. After having received information on plans to transfer him to a mental hospital, he escaped to the residence of the British Ambassador, who rejected his asylum request and handed him over to the police. On 9 June 1985, the author was redetained at the headquarters of the *Brigade mixte mobile* (BMM), a paramilitary police force, where he initially shared a cell with 20 murder convicts.

2.7 Allegedly as a result of the physical and mental torture he was subjected to during detention, the author suffered a stroke which paralysed his left side.

2.8 The author's detention reportedly provoked the so-called "Dinka riots", whereupon schools closed for several weeks. On 11 November 1985, Parliament adopted a resolution calling for a National Conference to address the Ambazonian question. In response, President Biya accused the President of Parliament of leading a "pro-Dinka" parliamentary revolt against him; he had the author charged with high treason before a Military Tribunal, allegedly asking for the death penalty. The prosecution's case collapsed in the absence of any legal provision which would have criminalized the author's call on President Biya to comply with the Restoration Law by withdrawing from Ambazonia. On 3 February 1986, the author was acquitted of all charges and released from detention.

2.9 President Biya's intention to appeal the judgement, after having ordered the author's rearrest, was frustrated because the law establishing the Military Tribunal did not provide for the possibility of appeal in cases involving high treason. The author was then placed under house arrest between 7 February 1986 and 28 March 1988. In a letter dated 15 May 1987, the Department of Political Affairs of the Ministry of Territorial Administration advised the author that his behaviour during house arrest was incompatible with his "probationary release" by the Military Tribunal, since he continued to hold meetings at his palace, to attend customary court sessions, to invoke his prerogatives as *Fon*, to contempt and disregard the law enforcement and other authorities, and to continue the practice of the illegal Olumba Olumba religion. On 25 March 1988, the Sub-Divisional Office of the Batibo Momo Division informed the author that because of his "judicial antecedent", his name had been removed from the register of electors until such time he could produce a "certificate of rehabilitation".

2.10 On 28 March 1988, the author went into exile in Nigeria. In 1995, he went to Great Britain, where he was recognized as a refugee and became a barrister.

The complaint

3.1 The author claims that the "illegal annexation" of Ambazonia by the Republic of Cameroon denies the will of Ambazonians to preserve their nationhood and sovereign powers, as expressed in the 1961 plebiscite and confirmed by a 1992 judgement of the High Court of Bamenda, thereby violating his people's right to self-determination under article 1, paragraph 1, of the Covenant. By reference to article 24, paragraph 3, he also alleges a breach of the right to his own nationality.

3.2 The author claims that his detention from 8 October 1981 to 7 October 1982 and from 31 May 1985 to 3 February 1986, as well as his subsequent house arrest from 7 February 1986 to 28 March 1988, were arbitrary and in breach of article 9, paragraph 1, of the Covenant. The conditions of detention and the ill-treatment suffered during the second detention period amounted to violations of articles 7 and 10, paragraph 1, while the fact that he was initially kept with a group of murder convicts at the BMM headquarters, upon his rearrest on 9 June 1985, violated article 10, paragraph 2 (a). He further claims that the restriction on his movement during house arrest and his current de facto prohibition from leaving and entering his country amount to a breach of article 12 of the Covenant.

3.3 The author alleges that his deprivation of the right to vote and to be elected at elections violated article 25 (b) of the Covenant.

3.4 Under article 19 of the Covenant, the author claims that his arrest on 31 May 1985 and his subsequent detention were punitive measures, designed to punish him for his regime-critical publications.

3.5 The author further alleges that his right, under article 9, paragraph 5, to compensation for unlawful detention from 8 October 1981 to 7 October 1982 was violated, because the authorities never replied to his compensation claim.

3.6 The author claims that all his attempts to seek domestic judicial redress were futile, as the authorities did not respond to his compensation claim and did not comply with national laws or with the judgements of the Cameroon Military Tribunal and the High Court of Bamenda. Following his escape from house arrest in 1988, domestic remedies were no longer available to him as a fugitive. He contents that the only way to make his rights prevail would be through a Committee decision, since Cameroon's authorities never respect their own tribunals' decisions in human rights-related matters.

3.7 The author submits that the same matter is not being examined under another procedure of international investigation or settlement.

Issues and proceedings before the Committee

Consideration of admissibility

4.1 On 12 November 2002, 26 May 2003 and 30 July 2003, the State party was requested to submit to the Committee information on the admissibility and merits of the communication. The Committee notes that this information has still not been received. The Committee regrets the State party's failure to provide any information with regard to the admissibility or the substance of the author's claims. It recalls that it is implicit in article 4, paragraph 2, of the Optional Protocol that States parties examine in good faith all the allegations brought against them, and that they make available to the Committee all information at their disposal. In the absence of a reply from the State party, due weight must be given to the author's allegations, to the extent that they are substantiated.[3]

4.2 The Committee has noted that several years passed between the occurrence of the events at the basis of the author's communication, his attempts to avail himself of domestic remedies, and the time of submission of his case to the Committee. While such substantial delays might, in different circumstances, be characterized as an abuse of the right of submission within the meaning of article 3 of the Optional Protocol, unless a convincing explanation on justification of this delay has been adduced,[4] the Committee also is mindful of the State party's failure to cooperate with it and to present to it its observations on the admissibility and merits of the case. In the circumstances, the Committee does not consider it necessary further to address this issue.

4.3 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

4.4 Insofar as the author claims that his and his people's right to self-determination has been violated by the State party's failure to implement the 1961 plebiscite, Restoration Law 84/01, the 1992 judgement of the High Court of Bamenda, or by its "subjugation" of the Ambazonians, the Committee recalls that it does not have competence under the Optional Protocol to consider claims alleging a violation of the right to self determination protected in article 1 of the Covenant.[5] The Optional Protocol provides a procedure under which individuals can claim that their individual rights have been violated. These rights are set out in part III (arts. 6 to 27) of the Covenant.[6] It follows that this part of the communication is inadmissible under article 1 of the Optional Protocol.

4.5 Regarding the author's claim that his incarceration from 8 October 1981 to 7 October 1982 was arbitrary, in violation of article 9, paragraph 1, of the Covenant, given that his conviction was expunged by Amnesty Law 82/21, the Committee recalls that it cannot consider alleged violations of the Covenant which occurred before the entry into force of the Optional Protocol for the State party, unless these violations continue after that date or continue to have effects which in themselves constitute a violation of the Covenant.[7] It notes that the author's incarceration in 1981-82 predates the entry into force of the Optional Protocol for the State party on 27 September 1984. The Committee observes that, while punishment suffered as a result of a criminal conviction that was subsequently reversed may continue to produce effects for as long as the victim of such punishment has not been compensated according to law, this is an issue which arises under article 14, paragraph 6, rather than under article 9, paragraph 1, of the Covenant. It does not therefore consider that the alleged arbitrary detention of the author continued to have effects beyond 27 September 1984, which would in themselves have constituted a violation of article 9, paragraph 1, of the Covenant. The Committee concludes that this part of the communication is inadmissible *ratione temporis* under article 1 of the Optional Protocol.

4.6 As to the author's allegation that he was not compensated for his unlawful detention in 1981-1982, the Committee considers that the author has not provided sufficient information to substantiate his claim, for purposes of admissibility. In particular, he did not provide copies, nor indicate the date or addressee of any letters to the competent authorities, claiming compensation. It follows that this claim is inadmissible under article 2 of the Optional Protocol.

4.7 Insofar as the author claims a violation of articles 7 of the Covenant in that he was physically and mentally tortured in detention after his rearrest on 9 June 1985 (and which allegedly resulted in a stroke which paralysed his left side), the Committee notes that he has not provided any details about the ill-treatment allegedly suffered, nor copies of any medical reports which would corroborate his allegation. Therefore, the Committee concludes that the author has not substantiated this claim, for purposes of admissibility, and that this part of the communication is inadmissible under article 2 of the Optional Protocol.

4.8 With regard to the author's claim that his arrest on 31 May 1985 and his subsequent detention were measures designed to punish him for the publication of his regime-critical pamphlets, in violation of article 19 of the Covenant, the Committee finds that the author has not substantiated, for purposes of admissibility, that said detention was a direct consequence of such publications. It follows that this part of the communication is also inadmissible under article 2 of the Optional Protocol.

4.9 As regards the author's claim under article 25 (b) of the Covenant, the Committee is of the view that exercise of the right to vote and to stand for election is dependent on the name of the person concerned being included in the register of voters. If the author's name is not on the register of voters or is removed from the register, he cannot exercise his right to vote or stand for election. In the absence of any explanations from the State party, the Committee notes that the author's name was arbitrarily removed from the voters' list, without any motivation or court decision. The very fact of removal of the author's name from the register of voters may therefore constitute denial of his right to vote and to stand for election in accordance with article 25 (b) of the Covenant. The Committee is accordingly of the view that the author has sufficiently substantiated this claim, for purposes of admissibility.

4.10 Insofar as the author claims that he is being denied his right to Ambazonian nationality, in violation of article 24, paragraph 3, of the Covenant, the Committee recalls that this provision protects the right of every child to acquire a nationality. Its purpose is to prevent a child from being afforded less protection by society and the State because he or she is stateless[8], rather than to afford an entitlement to a nationality of one's own choice. It follows that this part of the communication is inadmissible *ratione materiae* under article 3 of the Optional Protocol.

4.11 With regard to exhaustion of domestic remedies, the Committee takes note of the author's argument that, following his escape from house arrest in 1988, he was not in a position to seek redress at the domestic level, as a person who was wanted in Cameroon. In the light of its jurisprudence[9] that article 5, paragraph 2 (b), of the Optional Protocol does not require resort to remedies which objectively have no prospect of success, and in the absence of any indication by the State party that the author could have availed himself of effective remedies, the Committee is satisfied that the author has sufficiently demonstrated the ineffectiveness and unavailability of domestic remedies in his particular case.

4.12 The Committee concludes that the communication is admissible, insofar as it raises issues under articles 7, 9, paragraph 1, 10, paragraphs 1 and 2 (a), 12 and 25 (b) of the Covenant, and to the extent that it relates to the lawfulness and the conditions of detention following his arrest on 31 May 1985, his incarceration initially with a group of murder convicts at the BMM headquarters, the lawfulness of, as well as the restrictions on his liberty of movement during his house arrest from 7 February 1986 to 28 March 1988, and the removal of his name from the voters' register.

Consideration of the merits

5.1 The first issue before the Committee is whether the author's detention from 31 May 1985 to 3 February 1986 was arbitrary. In accordance with the Committee's constant jurisprudence,[10] "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law. This means that remand in custody must not only be lawful but reasonable and necessary in all the circumstances, for example to prevent flight, interference with evidence or the recurrence of crime.[11] The State party has not invoked any such elements in the instant case. The Committee further recalls the author's uncontested claim that it was only after his arrest on 31 May 1985 and his rearrest on 9 June 1985 that President Biya filed criminal charges against him, allegedly without any legal basis and with the intention to influence the outcome of the trial before the Military Tribunal. Against this background, the Committee finds that the author's detention between 31 May 1985 and 3 February 1986 was neither reasonable nor necessary in the circumstances of the case, and thus in violation of article 9, paragraph 1, of the Covenant.

5.2 With regard to the conditions of detention, the Committee takes note of the author's uncontested allegation that he was kept in a wet and dirty cell without a bed, table or any sanitary facilities. It reiterates that persons deprived of their liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty and that they must be treated in accordance with, inter alia, the Standard Minimum Rules for the Treatment of Prisoners (1957).[12] In the absence of State party information on the conditions of the author's detention, the Committee concludes that the author's rights under article 10, paragraph 1, were violated during his detention between 31 May 1985 and the day of his hospitalization.

5.3 The Committee notes that the author's claim that he was initially kept in a cell with 20 murder convicts at the headquarters of the *Brigade mixte mobile* has not been challenged by the State party, which has not adduced any exceptional circumstances which would have justified its failure to segregate the author from such convicts in order to emphasize his status as an unconvicted person. The Committee therefore finds that the author's rights under article 10, paragraph 2 (a), of the Covenant were breached during his detention at the BMM headquarters.

5.4 As to the author's claim that his house arrest between 7 February 1986 and 28 March 1988 was arbitrary, in violation of article 9, paragraph 1, of the Covenant, the Committee takes note of the letter dated 15 May 1987 from the Department of Political Affairs of the Ministry of Territorial Administration, which criticized the author's behaviour during his house arrest. This confirms that the author was indeed under house arrest. The Committee further notes that this house arrest was imposed on him after his acquittal and release by virtue of a final judgement of the Military Tribunal. The Committee recalls that article 9, paragraph 1, is applicable to all forms of deprivation of liberty[13] and observes that the author's house arrest was unlawful and therefore arbitrary in the circumstances of the case, and thus in violation of article 9, paragraph 1.

5.5 In the absence of any exceptional circumstances adduced by the State party, which would have justified any restrictions on the author's right to liberty of movement, the Committee finds that the author's rights under article 12, paragraph 1, of the Covenant were violated during his house arrest, which was itself unlawful and arbitrary.

5.6 As regards the author's claim that the removal of his name from the voters' register violates his rights under article 25 (b) of the Covenant, the Committee observes that the exercise of the right to vote and to be elected may not be suspended or excluded except on grounds established by law which are objective and reasonable.[14] Although the letter dated 25 March 1998, which informed the author of the removal of his name from the register of voters, refers to the "current electoral law", it justifies that measure with his "judicial antecedent". In this regard, the Committee reiterates that persons who are deprived of liberty but who have not been convicted should not be excluded from exercising the right to vote,[15] and recalls that the author was acquitted by the Military Tribunal in 1986 and that his conviction by another tribunal in 1981 was expunged by virtue of Amnesty Law 82/21. It also recalls that persons who are otherwise eligible to stand for election should not be excluded by reason of political affiliation.[16] In the absence of any objective and reasonable grounds to justify the author's deprivation of his right to vote and to be elected, the Committee concludes, on the basis of the material before it, that the removal of the author's name from the voters' register amounts to a violation of his rights under article 25 (b) of the Covenant.

6. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal violations of articles 9, paragraph 1; 10, paragraphs 1 and 2 (a); 12, paragraph 1; and 25 (b) of the Covenant.

7. In accordance with article 2, paragraph 3, of the Covenant, the author is entitled to an effective remedy, including compensation and assurance of the enjoyment of his civil and political rights. The State party is also under an obligation to take measures to prevent similar violations in the future.

8. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, that State party has undertaken to ensure all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] The Covenant and the Optional Protocol entered into force for the State party on 27 September 1984.

[2] The communication was submitted by the author personally. However, by letter dated 4 August 2004, Ms. Irene Schäfer presented an instrument executed by the author making her counsel of record.

[3] See communication No. 912/2000, *Deolall v. Guyana*, Views adopted on 1 November 2004, para. 4.1.

[4] See communication No. 788/ 1997, *Gobin v. Mauritius*, decision of inadmissibility adopted on 16 July 2001, para. 6.3.

[5] See communication No. 932/2000, *Gillot v. France*, Views adopted on 15 July 2002, at para. 13.4.

[6] See communication No. 167/1984, *Bernard Ominayak et al. v. Canada*, Views adopted on 26 March 1990, at para. 32.1.

[7] See communication No. 520/1992, *Könye and Könye v. Hungary*, decision on admissibility adopted on 7 April 1994, at para. 6.4; communication No. 24/1977, *Sandra Lovelace v. Canada*, Views adopted on 30 July 1981, at para. 7.3.

[8] See general comment No. 17 [35] on art. 24, para. 8.

[9] See, e.g., communications Nos. 210/1986 and 225/1987, *Earl Pratt and Ivan Morgan v. Jamaica*, Views adopted on 6 April 1989, para. 12.3.

[10] See communication No. 305/1988, *Van Alphen v. The Netherlands*, Views adopted on 23 July 1990, para. 5.8; communication No. 458/1991, *Mukong v. Cameroon*, Views adopted on 21 July 1994, para. 9.8.

[11] See ibid.

[12] General comment No. 21 [44] on art. 10, paras. 3 and 5.

[13] General comment No. 8 [16] on art. 9, para. 1.

[14] General comment No. 25 [57] on art. 25, para. 4.

[15] Ibid., at para. 14.

[16] Ibid., at para. 15.

X. Communication No. 1155/2003, *Leirvåg v. Norway* (Views adopted on 3 November 2004, eighty-second session)*

Submitted by:	Ms. and Mr. Unn and Ben Leirvåg, and their daughter Guro, Mr. Richard Jansen, and his daughter Maria, Ms. and Mr. Birgit and Jens Orning, and their daughter Pia Suzanne, and Ms. Irene Galåen and Mr. Edvin Paulsen, and their son Kevin Johnny Galåen (represented by the law firm Stavrum, Nystuen & Bøen, by lawyer Laurentz Stavrum)
Alleged victim:	The authors
State party:	Norway
Date of communication:	25 March, 7 and 10 September 2002 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 3 November 2004,

Having concluded its consideration of communication No. 1155/2003, submitted to the Human Rights Committee on behalf of Ms. and Mr. Unn and Ben Leirvåg, and their daughter Guro, Mr. Richard Jansen, and his daughter Maria, Ms. and Mr. Birgit and Jens Orning, and their daughter Pia Suzanne, and Ms. Irene Galåen and Mr. Edvin Paulsen, and their son Kevin Johnny Galåen, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The authors of the communication are Ms. and Mr. Unn and Ben Leirvåg, and their daughter Guro, Mr. Richard Jansen, and his daughter Maria, Ms. and Mr. Birgit and Jens Orning, and their daughter Pia Suzanne, and Ms. Irene Galåen and Mr. Edvin Paulsen, and their son Kevin Johnny Galåen. All are Norwegian citizens who claim to be victims of violations of articles 17, 18, and 26, of the International Covenant on Civil and Political rights by Norway. They are represented by counsel.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen. Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

The general background submitted by the authors

2.1 Norway has a state religion and a State Church, of which approximately 86 per cent of the population are members. Article 2 of the Norwegian Constitution states that the Evangelical Lutheran Church is the official state religion, and further determines that "those of the inhabitants, who subscribe to this have an obligation to bring up their children in the same manner". Christianity has been taught since the general mandatory education was introduced in 1739, but from the time of the Dissenter or Non-conformist Act of 1845, a right of exemption for children of other faiths has existed.

2.2 At the same time, pupils so exempted had the right to participate in a non-denominational alternative life stance subject "life stance knowledge". However, it was not compulsory for the exempted pupils to participate or attend tutoring in this subject, and the subject did not have the same basic framework as other subjects, for example the number of school hours. A number of pupils thus participated in neither the Christianity nor life stance subjects.

2.3 In August 1997, the Norwegian government introduced a new mandatory religious subject in the Norwegian school system, entitled "Christian Knowledge and Religious and Ethical Education" (hereafter referred to as CKREE) replacing the previous Christianity subject and the life stance subject. This new subject only provides for exemption from certain limited segments of the teaching. The new Education Act's §2 (4) stipulates that education provided in the CKREE subject shall be based on the schools' Christian object clause[1] and provide "thorough knowledge of the Bible and Christianity as a cultural heritage and Evangelical-Lutheran Faith". During the preparation of the Act, the Parliament instructed the Ministry to obtain a professional evaluation of the Act's relationship with human rights. This evaluation was carried out by the then Appeals Court judge Erik Møse, who stated that:

> *"As the situation stands, I find that the safest option is a general right of exemption. This will mean that the international inspectorate bodies will not involve themselves with the questions of the doubt raised by compulsory education. However, I cannot state that the partial exemption will be in contravention of the conventions. The premise is that one establishes an arrangement that in practice lies within their (the conventions') frameworks. Much will depend on the further legislative process and the actual implementation of the subject."*

2.4 The Ministry's circular on the subject states that: "*When pupils request exemption, written notification of this shall be sent to the school. The notification must state the reason for what they experience as the practice of another religion or affiliation to a different life stance in the tutoring.*" A later circular from the Ministry states that demands for exemption on grounds other than those governed by clearly religious activities must be assessed on the basis of strict criteria.

2.5 The Norwegian Humanist Association (the NHA), of which the authors are members, engaged an expert in Minority Psychology in the autumn of 2000 to investigate and report on how children react to conflicting life stance-related upbringing and education both in school and at home. He interviewed among others the authors. His conclusion was amongst others that both children and parents (and in all likelihood the school) experience conflicts of loyalty, pressure to conform and acquiesce to the norm, and for some of the children bullying and a feeling of helplessness. The report was put before the State party and presented as evidence in Supreme Court proceedings.

2.6 Due to criticism of the subject and the limited right to exemptions, the legislators decided that the subject would be evaluated in the course of a three-year period after its introduction. The Ministry gave this task to the Norwegian Research Council, which engaged three research institutes carry out the evaluation. The results were published in two reports in October 2000. One of the reports concluded that, "*the partial exemption arrangements did not function in a way that parents' rights were sufficiently protected*". Subsequently, the Ministry issued a press release stating that "*the partial exemption does not function as intended and should therefore be thoroughly reviewed*".

2.7 The issue was debated in Parliament and a proposal was adopted that from the start of the school year 2002, the subject's name should be "Christianity and General Religious and Moral Education". It was emphasized that all teaching would be based on the school's Christian object clause and that Christianity covered 55 per cent of the teaching hours, leaving 25 per cent to other religious/life stances and 20 per cent to ethical and philosophical themes. A standardised form for applications for exemption from religious activities was issued to simplify existing exemption arrangements. The idea was that it would not be necessary to submit the application form more than once per educational stage, in other words three times during the total period of schooling. It was emphasized that it was still only religious activities, not the knowledge thereof, that were subject to exemption. Subsequently, a Curriculum Group was gathered to assist the Norwegian Board of Education in implementing the changes. Although the majority of the Curriculum Group voted against it, the Ministry included in the revised curriculum that a clause that the teaching of knowledge of religions and life stances that are not represented in the local community can be postponed from the primary school until the intermediate stage. The authors contend that this confirms the prioritizing of the majority's identity at the cost of pluralism.

2.8 Several organizations representing minorities with different beliefs voiced strong objections to the CKREE subjects. After school started in the autumn of 1997, a number of parents, including the authors, demanded full exemption from relevant instruction. Their applications were rejected by the schools concerned, and on administrative appeal to the Regional Director of Education, on the ground that such exemption was not authorized under the Act.

2.9 On 14 March 1998, the NHA and the parents of eight pupils, including the authors in the present case, instituted proceedings before the Oslo City Court. By judgement of 16 April 1999, the Oslo City Court rejected the authors' claims. On 6 October 2000, upon appeal, the Borgarting Court of Appeal upheld this decision. The decision was confirmed upon further appeal, by the Supreme Court in its judgement of 22 August 2001, thus it is claimed that domestic remedies have been exhausted. Three of the other parents in the national court suit, and the NHA, decided to bring their complaint to the European Court of Human Rights (hereinafter denominated ECHR)).

The facts as submitted by Ms. and Mr. Unn and Ben Leirvåg, and their daughter Guro

3.1 Unn and Ben Leirvåg have a non-religious humanist life stance. They did not wish to see their daughter participate in CKREE classes, where textbooks are in conflict with their life stance. Their daughter, Guro (born on 17 February 1991), started at Bratsbergkleiva School in Porsgrunn in the autumn of 1997. Her application for full exemption from the CKREE subject was rejected. Subsequently, Guro attended CKREE classes.

3.2 As time passed with Guro's attendance of CKREE classes, the parents became aware that most of the material used in the subject was religious narrative and mythology as the sole basis for understanding the world and reflection on moral and ethical issues. Unn Leirvåg, a teacher, applied professional skills on the evaluation of the curriculum, syllabus and textbooks, and found that the main theme of the subject matter in the first to fourth school year was taught through retelling Bible stories and relating them to the pupils. The CKREE subject thereby ensures that the children are immersed deeply into the stories contained in the Bible as a framework around their own perception of reality. The children start with stories from the Old Testament; the main lesson appearing is that the worst thing a person can do is to disobey God. Subsequently, the Gospel is introduced, where the faith in a leader and follow him is put forward as an ideal. This is again followed by similar narrative from other religions. On this basis, the pupils are expected to learn how to think about how they should behave. It is submitted that religious doctrines form an uncritical basis, availing their daughter of no opportunity or means to distance herself from, make any reservation against, or criticize the basis. Guro started to use certain expressions that indicate that the things she learns about Christianity are synonymous with "good".

3.3 Against her parents' will, Guro found herself in a situation where a conflict of loyalties arose between school and home. The situation is such that Guro feels obliged to adapt what she tells her parents about school to match what she feels is acceptable to her parents.

The facts as submitted by Mr. Richard Jansen and his daughter Maria

4.1 Richard Jansen a humanist, does not wish his daughter to be taught a subject that provides for the opportunity of preaching of religion. When his daughter Maria (born on 3 March 1991) started to attend Lesterud School in Bærum in the autumn of 1997, an application for full exemption from the CKREE subject was filed on her behalf, which was rejected. A partial exemption was granted in accordance with the new law. The authors concluded that a partial exemption did not work in practice and appealed the decision to the Director of Education in Oslo and Akershus, who upheld the school's rejection in rulings of 25 May 1998 and January 2000.

4.2 Subsequently, Maria attended segments of the tutoring under the partial exemption arrangement. The authors state that Maria on several cases came home from school and said that she had been teased because her family did not believe in God. In connection with the end of year term celebrations for Christmas, Maria was picked out to learn by heart and perform a Christian text. The school was unable to provide her parents with a local timetable including an overview of the themes to be treated by Maria's class. Instead, they were referred to the main curriculum and the weekly timetable. Maria's parents did exempt her from some lessons during her first year at school. On these occasions she was placed in the kitchen where she was told to draw, sometimes alone, and sometimes under supervision. When her parents became aware that banishment to the kitchen was used as a punishment for pupils who behaved badly in class, they stopped exempting her from lessons.

The facts as submitted by Ms. and Mr. Birgit and Jens Orning, and their daughter Pia Suzanne

5.1 Birgit and Jens Orning are humanists and members of the NHA. They do not wish their children to participate in religious instruction that contains preaching. The CKREE subject influences the children in a Christian/religious direction. The authors believe that the child's life stance should develop freely and naturally, an objective difficult to achieve in the framework of the CKREE subject.

5.2 Their daughter, Pia Suzanne (born on 23 May 1990), started school in the autumn of 1997. The parents applied for full exemption from the CKREE subject. Their application was rejected. Subsequently, Pia Suzanne was enrolled under the partial exemption from the CKREE subject, an arrangement that did not work according to her parents' wishes. For example, even though Pia Suzanne was not to participate in religious tutoring that practiced preaching, she was enrolled in such tutoring.

5.3 The authors submit that their daughter was on at least two occasions instructed to learn and recite psalms and Bible texts in connection with the end of term Christmas celebrations. The children were also required to learn a number of psalms and Bible texts by heart, a fact that is confirmed by their workbooks. As a result of the religious instruction, Pia often experienced conflicts of loyalty between her home and her school. Her parents decided to move to another part of the country where they could enrol Pia in a private school.

The facts as submitted by Ms. Irene Galåen and Mr. Edvin Paulsen, and their son Kevin Johnny Galåen

6.1 Kevin Galåen's (born on 18 February 1987) parents are humanists and want the tuition of their son to have a non-dogmatic, agnostic basis. They consider the CKREE subject to be so designed that it would gradually absorb their son into the Christian faith. Therefore, they applied for full exemption for Kevin from CKREE subject in the autumn 1997; the application was rejected. Subsequently, Kevin attended CKREE classes. The parents did not apply for partial exemption as they did not consider it to be of any use in their case.

6.2 Kevin did not start school with a fully developed life stance. It is important to Kevin's parents that he can experience his parent's life stance as a natural standpoint on his journey to adulthood and in his meeting with other life stances and philosophies. Kevin's parents consider that the CKREE subject does not comply with this requirement since they use Christianity as a basis for the treatment of existential questions and religious pedagogic methods. The life stance they believe in is only represented by small fragments and totally without a whole and consistence. They state that the CKREE subject is over-concentrating on a single religion.

The complaint

7.1 The authors claim that the State party violated their rights to freedom of religion - i.e. their right to decide on the type of life stance upbringing and education their children shall have - and their right to privacy. It is also claimed that the partial exemption procedure violates the prohibition of discrimination.

7.2 It is argued that the right to freedom of thought, conscience and religion, as enshrined in article 18 of the Covenant, also applies to non-religious life stances, and that parents have, pursuant to paragraph 4 of that article, a right to ensure that their children receive education in accordance with their own philosophical convictions, in particular in relation to mandatory, state-provided education. The authors refer to the Committee's Views in the case of *Hartikainen et al. v. Finland* (communication No. 40/1978) and to general comment No. 22 on article 18, in particular its paragraphs 3 and 6. Reference is also made to the Committee's concluding observations on the fourth periodic report by Norway, where the Committee reiterated its concerns over section 2 of the Constitution which provides that individuals professing the Evangelical-Lutheran religion are bound to bring up their children in the same faith and held that this provision of the Constitution is "incompatible with the Covenant" (CCPR/C/79/Add.112, para. 13).

7.3 The Committee on the Rights of the Child in its concluding observations on the report by Norway, adopted on 2 June 2000, also expressed concerns about the CKREE, in particular on the process of providing for exemption which it considered to be potentially discriminatory (CRC/C/15/Add.126, paras. 26-27).

7.4 While the State party has argued that it is necessary for children to understand and learn about various life stances in order to develop their own life stance identity and a greater level of respect for other religions and life stances, the authors consider that a mandatory religious subject is not a suitable vehicle for obtaining the desired result. They find that the introduction of the CKREE has lowered the respect for their own life stances.

7.5 Furthermore, it is submitted that the obligatory attendance of CKREE teaching is not necessary in a democratic society. This is demonstrated through the absence of such compulsory teaching in Norway prior to the introduction of the CKREE, as well as in other European states.

7.6 The authors claim that a more suitable vehicle to achieve the desired result would be to strengthen the pre-CKREE life stance subject, and make it mandatory for pupils that are exempted from religious studies. The CKREE subject is based on Christian premises and fulfils only the part of the intention that applies to the strengthening of the identity of children from Christian homes. Therefore, the compulsory CKREE subject represents a violation of the authors' rights to display an independent life stance.

7.7 In relation to the children, it is submitted their right to choose and hold a religion or life stance of their own is violated, in that the compulsory CKREE subject forces them to participate in a learning process that includes indoctrination into the direction of a religious/Christian life stance. The authors have no wish to be incorporated in such a religious/Christian conception of reality.

7.8 The partial exemption arrangement implies that there shall be communication between the parents and the school about what they consider problematic. This implies that the parents' life stance forms the basis for the evaluation of the exemption, in particular during the early school years. Instead of a free and independent development of the child's life stance, the child is forced to take a junior role in relation to its parents. This conflicts with the humanist view of the child's development shared by the authors' families. The authorities' evaluation of whether there are grounds for an application for exemption imposes on the children a conflict of loyalties between the school and the parents.

7.9 The partial exemption arrangement also requires that the authors describe to the school officers, the segments of the CKREE education that conflict with their own convictions, thus violating their right to privacy under article 17 of the Covenant. In relation to the children, it is submitted that they are subjected to a violation of their right to privacy to the extent that they are drawn into the exemption process.

7.10 The authors contend that the facts as submitted also constitute a violation of their rights under article 27 of the Covenant.

7.11 The authors submit that the exemption arrangement in place put heavier requirements on non-Christian parents than on Christian parents, making imposition of this procedure discriminatory, in violation of article 26 of the Covenant. The exemption arrangement requires that the authors have a clear insight into other life stances and educational methodology and practice, an ability to formulate their opinions, and the time and opportunity follow up the exemption arrangement in practice, whereas no such requirements apply to Christian parents. The exemption arrangement stigmatises in that it obliges the authors to state which segments of the CKREE subject are problematic in relation to their own life stance, which in turn will appear as a "deviation" from the commonly held life stance. The imposition on the authors to reveal their own life stance to school officers is claimed to be in violation of article 26 in conjunction with article 18, paragraphs 1-4.

7.12 In relation to the children, it is submitted that the partial exemption means that they shall not participate in the activity stipulated in the syllabus, but would gradually obtain the same knowledge of the theme in question as other pupils. The approach of those exempted to the material will therefore be qualitatively inferior to the other pupils. This entails a sense of being different which can be experienced as problematic and creates a sense of insecurity and conflicts of loyalty.

The State party's submission on admissibility

8.1 On 3 July 2003, the State party commented on the admissibility of the complaint. It challenges the admissibility on the basis that the same matter is already being examined under another procedure of international investigation or settlement, for non-exhaustion of domestic remedies and for non-substantiation of their claims.

8.2 The State party notes that before the Norwegian courts, the authors' claims of exemption from the school subject named "*Christian Knowledge and Religious and Ethical Education*" were adjudicated in a single case, along with identical claims from three other sets of parents. The different parties were all represented by the same lawyer (the identical to counsel in this case), and their identical claims were adjudicated as one. No attempts were made to individualize the cases of the different parties. The domestic courts passed a single judgement concerning all the parties, and none of the courts differentiated between the parties. Despite having pleaded their case jointly before the domestic courts, the parties opted to send complaints both to the European Court of Human Rights (ECHR) and to the Human Rights Committee. Four sets of parents lodged their communications with the Human Rights Committee, and three others with the ECHR on 20 February 2002. The communications to the Human Rights Committee and to the ECHR are to a large extent identical. Thus it appears that the authors stand together, but that they are seeking a review by both international bodies of what is essentially one case.

8.3 While the State party acknowledges the Committee's findings on communication No. 777/1997,[2] it submits that the present case should be held inadmissible because the same matter is being examined by the ECHR. It contends that the present case differs from the case of Sanchez Lopez in that the authors in that case argued that "*although the complaint submitted to the European Commission of Human Rights relates to the same matter, in that the complaint, the offence, the victim and, of course, the Spanish judicial decisions, including the relevant application for amparo, were not the same*". In the present case the same judgement by the Norwegian Supreme Court is being challenged before both bodies. The Norwegian Supreme Court judgement concerned an issue of principle, whether or not the CKREE subject violated international human rights standards.

8.4 If the communication is deemed admissible, the international bodies will need to take a general approach, i.e. they have to ask whether or not the subject as such, in the absence of the right to a full exemption, is in violation of the right to freedom of religion. As the primary objective of article 5, paragraph 2 (a), of the Optional Protocol is to prevent a duplication of examination by international bodies of the same case, such duplication is exactly what the different parties to the case adjudicated by Norwegian courts are operating.

8.5 On the issue of exhaustion of domestic remedies, the State party submits that the claims under articles 17 and 18 were not raised in the domestic proceedings, and thus domestic remedies have not been exhausted. It refers to section 2-4, paragraph 4 of the Education Act which allows for partial exemption from teaching in the CKREE subject, namely from those parts of the teaching that they, on the basis of their own religion or philosophy of life, perceive as being the practice of another religion or adherence to another philosophy of life. Schools must allow for exemption from the parts of the tuition that reasonably may be perceived as being the practice of another religion or adherence to another life philosophy. A decision by a school not to allow for exemption is subject to administrative appeal to the County Governor, whose decision again may in turn be brought before the courts for a judicial review.

8.6 The authors did not avail themselves of the possibility of applying for partial exemption; their cases concern applications for full exemption from the CKREE subject. Any basis for finding a violation of articles 17 and 18 would have to be found in the tuition offered to the authors' children. Such violation, however, could have been avoided by applications for partial exemption. To comply with the requirement of exhaustion of domestic remedies, the authors would first have to exercise their right under section 2-4, paragraph 4. If the school and the County Governor did not grant partial exemptions, the authors would have to apply for judicial review.

8.7 The State party argues that the authors' claims under articles 26 and 27 are insufficiently substantiated. As to article 26, the State party points out that the exemption clause of the Education Act applies to all parents, regardless of religion or life stance. Also, the syllabus for the CKREE subject provides for tuition in tenets of Christianity and other religions and life stances, shall not involve preaching, and shall be founded on the same educational principles.[3] Any differentiation between Christians and other groups is based on objective and reasonable criteria. The school subject at issue has important cultural and educational objectives. Limiting the possibilities for exemption to those parts of the tuition that reasonably may be perceived as being the practice of another religion or adherence to another philosophy of life, cannot be considered discrimination contrary to article 26.

8.8 On article 27, the State party notes that the authors have simply invoked this provision without making any attempt at explaining how a group defines itself as non-Christians, can constitute a religious minority within the meaning of article 27.

8.9 On 9 July 2003, the Committee's Special Rapporteur on new communications and interim measures declined to separate the admissibility and the merits of the complaint.

The State party's submission on the merits

9.1 On 21 November 2003, the State party commented on the merits of the complaint. The principal issue of the case before the domestic courts was whether or not the CKREE subject in general, in the absence of a full exemption clause, was in violation of the human rights treaties ratified by Norway, including the ICCPR. Accordingly, all claims made in the present communication have already been assessed by the domestic courts, including the Supreme Court of Norway. The Supreme Court concluded that the CKREE subject with its partial exemption clause is in full compliance with international human rights.

9.2 When Norwegian authorities proposed a new national curriculum for mandatory education to the Parliament in 1995, the Parliament's Standing Committee on Education, Research and Church Affairs ("the Education Committee") proposed that the curriculum should include a common subject encompassing Christianity and other religious and ethical beliefs. As some elements of the subject gave rise to concerns in relation to the rights of parents to secure their children's education in conformity with their own convictions, the Standing Committee requested the Government to prepare guidelines for exemption.

9.3 Proposals for amendments and guidelines for partial exemption to the CKREE subject were then drafted. The Government charged Erik Møse, then a Judge of the Court of Appeal, with the task of examining to what extent Norway's obligations might impose limitations with regard to compulsory instruction on issues of religion or philosophies of life, and to what extent exemption from instruction in the CKREE subject would have to be allowed for Mr. Møse's report concluded, inter alia, that a limited exemption would in principle be compatible with Norway's international legal obligations, provided that a system for practicing the exemption could be devised within the limits imposed by the conventions. Final conclusions would depend on the further process of establishing the legal framework for the CKREE subject, and the way the subject was taught in schools.

9.4 In response, the Ministry of Education proposed further amendments to the 1996 Education Act. The Act came into force on 1 July 1997. The right to exemption was limited to those parts of the instruction that are perceived by parents as being the practice of another religion or adherence to another philosophy of life.

9.5 The State party considers the rights of parents under article 18, paragraph 4, to be the core issue of the case. Their claim is based on their allegation that the CKREE subject amounts to "*both preaching and indoctrinating*" and that it is "*neither objective, pluralistic or neutral*", combined with the fact that the 1998 Education Act does not allow for full exemption. The State party submits that the CKREE subject is in conformity with the Covenant. However, the applicable law, regulations or instructions may be incorrectly applied in individual cases. Some teachers may include themes or choose words for their instruction that may be found indoctrinating or that particular schools or municipalities may practice the exemption clause in a manner that is inconsistent with the Act and the secondary legislation.

9.6 Parents who perceive the teaching as indoctrinating and do not obtain an exemption have several avenues of redress. Firstly, a decision not to allow for exemption may be subjected to administrative and/or judicial review. Secondly, claims of alleged human rights violations may be brought before the courts. The authors in the present case did not specify when or how their children were exposed to indoctrinating instruction for which they in vain have sought exemption as provided by the Act. As far as the State party is aware, none of the authors have had requests for partial exemption rejected, and certainly, no rejections have been brought before the domestic courts for judicial review.

9.7 The procedural choices of the authors must have consequences for the admissibility and merits of their case. The claim under article 18 should be held inadmissible because the authors have not exhausted the available and effective remedy of requesting partial exemption. Secondly, until such exemption has been sought, it cannot be established whether or not their children were compelled to participate in tuition, in violation of Covenant rights, and the authors thus cannot be considered victims of a violation of article 18. Thirdly, in the event that the communication is deemed admissible, the failure of the parents to challenge the tuition accorded to their children, must influence consideration of the merits. The Committee should limit its examination to the general issue of whether or not, in the absence of a clause providing for full exemption, the CKREE subject as such violates the rights of parents. There is no basis for examining the individual teaching experiences of the authors' children.

9.8 As to the authors' references to the textbooks, the State party points out that the textbooks are not defined as part of the subject's legal framework. The Act and secondary regulations confer discretion on the schools with regard to which and to what extent textbooks are to be used as part of the instruction. Nevertheless, should the Committee examine the particular instruction offered to the authors' children, the authors have made scant attempts to substantiate their claim that instruction is indoctrinating, which cannot be sufficient to sustain a finding of a violation. It should also be noted that the State party reported on the new CKREE subject in its fourth periodic report to the Committee, and that the Committee, in its, concluding observations, did not express concern regarding the subject's compatibility with the Covenant.

9.9 The State party submits that from general comment No. 22 on article 18, and the Committee's decision in *Hartikainen et al. v. Finland*,[4] can be inferred that article 18, paragraph 4, does not prohibit compulsory school instruction on issues of religion and philosophies of life, provided that the instruction is given in a neutral and objective way.

9.10 The State party contends that religious instruction imparted in a neutral and objective way complies with other human rights standards, such as the CESCR, and the CRC. Accordingly, article 18, paragraph 1 cannot bar compulsory education which is intended to "*enable all persons to participate effectively in a free society, [and] promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups*" (CESCR, art. 13, para. 1) or to develop respect for "*his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own*" (CRC, art. 29, para. 1 (c)). The CKREE is designed to promote understanding, tolerance and respect among pupils of different backgrounds, and to develop respect and understanding for one's own identity, the national history and values of Norway, as well as for other religions and philosophies of life.

9.11 The State party invokes the practice under article 2 of the Protocol No. 1 to the European Convention on Human Rights, which includes the State party's obligation to respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions. Reference is made to relevant jurisprudence of the ECHR.

9.12 The State party argues that the Committee's approach in the present case should be two-fold. Firstly, the Committee should examine whether or not the CKREE subject in general involves the imparting of information and knowledge in a manner that is not objective and neutral. Secondly, with regard to elements of the subject that do not meet those standards, it should examine whether or not sufficient provision has been made for non-discriminatory exemptions or alternatives that would accommodate the wishes of the parents.

9.13 With regard to the first issue, it is submitted that the CKREE subject involves only a few activities that may be perceived as being of a religious nature. Until 1997, knowledge of Christianity was taught as an independent subject in Norwegian schools. In 1997, the government introduced the CKREE subject in order to combat prejudices and discrimination, and to cater for mutual respect and tolerance between different groups religions and life stances as well as a better understanding of one's background and identity. Another explicit aim was to contribute to the enhancement of a collective cultural identity. The achievement of these goals requires that members of different groups jointly participate in the instruction. Consequently, the CKREE subject could not function in accordance with its purpose if full exemption from the subject was readily available to everyone.

9.14 Children are not required to attend public schools. It is possible for, i.e. the NHA or the authors, to establish private schools. This is a realistic and viable alternative also as regards economic risk, as the government carries more than 85 per cent of all expenditures related to the operation and functioning of private schools.

9.15 With regard to the authors' allegation that instruction in Christianity involves more time than instruction of other religions and philosophies of life, it is submitted that instruction in Christianity in itself cannot cause concerns under the Covenant, as long as the instruction is carried out in an objective and neutral manner. Reference is also made to a pertinent decision of the European Commission of Human Rights.

9.16 In response to the authors' challenge of the so-called *"Christian object clause"*[5] in section 1-2, paragraph 1, of the Education Act, the State party submits that, according to the Christian object clause itself, it shall only apply *"in agreement and cooperation with the home"*. Also, under section 3 of the Norwegian Human Rights Act, section 1-2 of the Education Act must be interpreted and applied in accordance with international human rights treaties that have been incorporated into domestic law (ICCPR, CESCR and ECHR). Consequently, the Christian object clause does not authorize preaching or indoctrination in Norwegian schools. This was the conclusion of the Supreme Court in the authors' case.

9.17 On the second issue, it is submitted that sufficient measures were taken to provide exemptions and/or alternatives to accommodate all parents with regard to activities that may be perceived as being of a religious nature. This solution was designed to meet the competing interests of recognizing the parents' right to secure their children's education in conformity with their own religious and philosophical convictions, while also acknowledging that society had a legitimate interest in enhancing mutual respect, understanding and tolerance between pupils of different backgrounds.

9.18 The most important mechanism is the provision[6] which allows from exemption from parts of the courses that were perceived as being the practice of another religion or philosophy of life, on the basis of written notification from concerned parents. The *travaux préparatoires* lay down further guidelines for allowing such exemption. Activities that allow for exemption are grouped in two different categories. Firstly, exemption shall be granted when requested for activities that clearly may be perceived to be of a religious nature. For such activities, parents are under no obligation to give reasons for their requests. In 2001, the Ministry simplified the exemption procedure by developing a notification form that may be used to claim exemption from eight different, specific activities, e.g. learning by heart of prayers, declarations of faith and religious texts, singing of religious hymns, attendance of religious service, excursions to churches, production of religious illustrations, active of passive roles in religious dramatizations, and receiving holy scripts as gifts and taking part in events in this context. Parents may claim exemptions from these activities by simply ticking off boxes for the relevant religion(s). Secondly, exemption may be granted from other activities, provided that they may reasonably be perceived as being the practice of another religion or adherence to another philosophy of life. For these cases, parents must present brief reasons for their request to enable the schools to consider whether the activity may reasonably be perceived as the practice of another religion or adherence to another life philosophy.

9.19 The second mechanism intended to remedy problems encountered on the basis of parents' religious or philosophical convictions involves flexibility in teaching, to the extent possible, and in accordance with the pupils' background.

9.20 On the alleged violation of article 26, the State party submits that to impose general obligations or rules, while at the same time allowing for exemptions provided that specific criteria are fulfilled, is an effective and admissible way of governing, and does not contravene article 26. Such methods of governing will, invariably, require that the citizens themselves consider whether they fulfil the requirements for exemption, and that they must duly apply for exemption, in the manner and within the time limits posed, and the State party does not consider such legal regimes to be discriminatory. The exemption clause does not distinguish between Christians and non-Christians.

9.21 In any event, the obligations imposed by the exemption clause cannot be considered disproportionate or unreasonable. Requests for exemption need not be justified by the parents in cases where the activities clearly may be perceived to be of a religious nature. General comment No. 22, paragraph 6, of the Committee appears to accept systems in which the general rule is that children must participate in school courses, with the possibility for exemption from instruction in a particular religion. Other subjects, such as history, music, physical education and social studies, may also give rise to religious or ethical issues, and the exemption clause therefore applies to all subjects. The State party considers that the only viable system both for those subjects and for the CKREE subject is to allow for partial exemptions. If that was deemed discrimination, article 26 would make most compulsory education impossible to carry out.

9.22 As to the alleged violation of article 17 on the ground that parents applying for partial exemption "must reveal elements of their life stance and beliefs to school officers and staff", the State party submits that parents only have to give reasons for activities that do not obviously appear to be the practice of a specific religion or adherence to a different philosophy of life. Where reasons have to be given, parents are not required to provide information on their own religion or philosophical convictions. School employees are under a strict duty of secrecy with regard to the knowledge they obtain about personal affairs of individuals.[7] If the Committee were to find that the requirement for reasons in certain cases constitutes an interference with the privacy of the authors, the State party argues that the interference neither is unlawful or arbitrary.

9.23 On the "lawfulness" of the interference, the State party notes that the obligation for parents to give reasons in certain cases is spelled out in section 2-4 of the Education Act. As to the notion of arbitrariness, the State party refers to the Committee's general comment No. 16, paragraph 4, and to the positive interests that the CKREE subject pursues, and submits that the partial exemption clause must be considered both reasonable and proportionate. Reference is made to the parallel of conscientious objection to compulsory military service, where conscientious objectors must give far more elaborate and more personal reasons for their requests than parents requesting exemptions from the CKREE subject, yet these systems have been accepted by international human rights bodies.

The authors' comments on admissibility and merits

10.1 On 6 and 27 April 2004, the authors commented on the State party submissions and withdraw their claim under article 27. They submit that the issue of whether or not the CKREE subject constitutes a violation of Covenant rights, must be seen in the broader context of a society with Christian predominance, as Norway has a state religion, a state church, constitutional prerogatives for the Christian faith, a Christian intention clause for public schools and preschools, state church priests in the armed forces, prisons, universities and hospitals, etc. Still, the right to freedom of religion for non-Christians has been taken care of in different ways, i.e., by an exemption arrangement from the Christian knowledge subject in public schools. The right to general exemption, practiced for more than 150 years, was eliminated when the CKREE subject was introduced in 1997.

10.2 On admissibility, the authors submit that the children were not formal plaintiffs before domestic courts because Norwegian civil procedure is based on the recognition of parents as legal representatives of their minor children. Had the children been formal plaintiffs, they would still have been represented by their parents and the factual context would have been the same as in this case. The children thus have no further domestic remedy.

10.3 While other sets of parents have lodged similar complaints with the ECHR, this cannot be considered as "*the same matter*" as the present case being examined "*under another procedure of international ... settlement*", within the meaning of article 5, paragraph 2 (a), of the Optional Protocol. Reference is made to relevant jurisprudence of the Committee,[8] which holds that if different individuals send their complaints to different international bodies, the complaints are not considered as the "same matter". The Norwegian civil procedure allows different parties to join in a common law suit. Before domestic courts, each author's case was presented separately. The claims concerned separate administrative decisions on the respective party's application for full exemption from the CKREE tuition. The fact that the NHA was recognized as a formal party before the lower courts, but denied such status before the Supreme Court, indicates that the Supreme Court considered the parents' separate claims.

10.4 The parents who were parties to the domestic court proceedings are all individuals, and have a right to decide which international body to complain to. That they share the same life stance and membership in a life stance organization does not change this situation. The communications before the Human Rights Committee and the ECHR are therefore not the "same matter".

10.5 On the State party's claim that they did not exhaust domestic remedies because they did not apply for partial exemption, the authors submit that two of them actually applied for partial exemption but that they reverted to an application for full exemption when they realized that the partial exemption arrangement did not protect their children from religious influence, and was perceived by them and the children to be stigmatizing. The partial exemption arrangement provides for exemptions from certain activities but not from certain knowledge. Consequently, the pupils may be exempted from praying but not from knowing the prayer. Accordingly, the authors claim that their right to full exemption is protected by the Covenant, and the State party's argument that they should have applied for partial exemption is dismissed as irrelevant.

10.6 On the State party's contention that their claim under article 26 is unsubstantiated, the authors reaffirm that non-Christians are discriminated against in that they have to give reasons for why they seek exemption from CKREE, whereas Christians are subjected to no such requirements since the CKREE subject is first and foremost designed for them. The Committee already characterized the Norwegian school system on education in religion as discriminatory (before the introduction of the CKREE subject in 1997). The new exemption arrangements are more discriminatory than the former system, since the former system only required that those applying for exemption stated whether or not they were members of the State church. After proceedings in the Supreme court, the State party introduced a standard form of notification of partial exemption from CKREE. This fact, however, is not relevant to the present case, and does not change the authors' view on the partial exemption procedure.

10.7 In response to the State party's argument that all claims in the present case have been carefully examined, the authors note that the Supreme Court chose not to examine the parents' substantial claims and approached the legal questions in a very general way.

10.8 The authors challenge the State party's legalistic approach to the question of a Covenant violation, since the practice of the law, that is the actual tuition and practice of the exemption, is the key to the question of whether or not there has been a Covenant violation. The Government appointed two research institutions to examine how the CKREE subject and in particular the partial exemption procedure worked in practice. One of them (Diaforsk) concluded that *the exemption arrangement did not function in a way that sufficiently protected the rights of parents in practice*. The press release from the Ministry of Church, Education and Research stated that *both investigations concluded that the partial exemption arrangement did not operate as planned and should therefore be reviewed.* Both research institutions recommended the introduction of a general right to exemption.

10.9 The authors consider that the CKREE subject itself constitutes a breach of their right to decide on their children's life stance education, and that a possible partial exemption in their cases would have encompassed such a great part of the subject that it would have exceeded the 50 per cent limit indicated in the *travaux préparatoires*. Partial exemption arrangements do not secure these parental rights, as those parts of tuition that may be exempted from, still are imparted to the student.

10.10 As admitted by the Government, the textbooks contain segments that may be conceived as professing Christianity. Although the textbooks are not defined as part of the subject's legal framework, they have been controlled and authorized by an official state agency, they have official status, and are used by 62 per cent of Norwegian schools.

10.11 The State party admits that at least parts of the CKREE tuition can be perceived as being of religious nature, but it does not comment on whether this fact implies that these parts of the education are inconsistent with the "*neutral and objective*" standard. The authors consider that a distinction between the parts that are of religious nature and those that are not cannot be made and that it has not even been attempted. Reference is made to the research results of the Diaforsk Institute, where it is stated that: "*We asked the teachers how they practiced this distinction in the tuition situation. Very few teachers understood what we meant by the question*." One of the CKREE goals, i.e. that of having all pupils to join in the tuition situation, is clearly contrary to the State party's argument that one has the freedom to choose private schooling for children from humanist homes. If humanists were to establish their own school, their children would not be gathered in the same tuition situation as other children.

10.12 The CKREE subject's emphasize on Christianity can be further illustrated by the *travaux préparatoires*, where the Education Committee stated: "*The majority underline[s] that the tuition is not neutral in value. That the instruction shall not be of a preaching character, must never be interpreted in the way that it should be practised in a religious/moral vacuum. All instruction and upbringing in our primary school shall have the starting point in the intention clause for the school, in this subject Christianity and the different religions and life stances should be present according to their particular character. The main emphasis of the subject is the instruction on Christianity*."

10.13 It is argued that the CKREE's discrimination of non-Christians is disproportionate and unreasonable since it was not necessary for the State party to abolish the previous arrangement, and that the purpose of bringing pupils together "*in order to combat prejudices and discrimination*", and other laudable intentions, could have been achieved by other arrangements than forcing everyone to take part in a subject predominantly designed for Christian upbringing.

Additional information by the State party

11.1 On 4 October 2004, the State party submitted additional observations on the admissibility and merits of the communication.[9] As to the admissibility of the communication, the State party reiterates its observations submitted earlier (27 April 2004). On the merits, the State party reiterates that the Supreme Court had carefully assessed the case and concluded that the CKREE subject and its partial exemption clause was in full compliance with international human rights; article 18 of the Covenant does not prohibit mandatory school instruction on issues of religion and philosophies of life, provided it is carried out in a pluralistic, neutral and objective way; Both the ICESCR (International Covenant on Economic, Social and Cultural Rights) and the Convention on the Rights of the Child impose positive obligations on the States parties to provide education with certain social and ethical dimensions; and the parents failed to challenge the specific tuition accorded to their children.

11.2 More specifically, the State party refers to the authors' main objection that by virtue of teaching of the CRKEE subject, their children may receive information that amounts to indoctrination. In order to avoid a violation of article 18, paragraph 4, they requested a full exemption of the CKREE. The State party considers unnecessary a full exemption as the subject is multidisciplinary, with components of social science, world religions, philosophy and ethics, in addition to Christian knowledge.

11.3 In respect to the authors' submissions, the State party contends that the CKREE was thoroughly evaluated and two independent reports were commissioned and considered in the 2000-2001 Report of the Ministry of Education to the Storing. The Supreme Court examined the reports and their administrative follow-up what constitutes, of the State party's opinion, the proof that the Court was fully aware of all aspects of the case when concluding that the CKREE subject was in conformity with international human rights covenants. The concluding remarks of the evaluation reports indicated that in the majority of the cases, partial exemptions operated satisfactorily, most parents found that the CKREE worked well for their children and that few teachers perceived partial exemption as source of practical problems.

11.4 With regard to the authors' allegation that the State party ignored warnings from different religious groups, human rights law body and the judge Mose's recommendation, it is stated that there was no unified position against the introduction of the CKREE subject in school, that religious minority groups participated in drawing up the new teaching plan approved by Parliament, and that at present there was a little, if any, disagreement on the exemption clause of the CKREE.

11.5 The State party further refers to the authors' commentary on the limited relevance of the ECHR case of *Kjeldsen, Busk Madsen and Pedersen v. Denmark*[10] to the present case, because it related to mandatory sex education and not religious education.

11.6 The State party points out, with respect to the authors' allegations that in its observations the Committee of the Rights of the Child expressed concern of "the process of providing for exemptions", without giving the reasons for its concern. Since the adoption of the above observations (2 June 2000), the CKREE subject and its exemption process have been thoroughly evaluated and the authorities acted on concerns raised by granting exemptions upon standardized notification and by facilitating the communications between schools and homes. Finally, the State party notes that the Committee did not object to a partial exemption scheme, nor supported the authors' claims for a full exemption.

11.7 The State party affirms that many subjects taught at school may include information or actions perceived to have philosophical or religious aspects. It notes that in the present case, the authors of the communication were not concerned by subjects such as science, music, physical education and home economics, but that there were religious minorities that refused to take partially part to these subjects, i.e. to the practical aspects of physical education and music. The State party affirms that a partial exemption clause is, in general and in respect to CKREE in particular, the only viable way of carrying out mandatory education.

11.8 As to the issue of discrimination, the State party notes that the authors' appear to have misapprehended its observations, by taking out the words "do not" from the following sentence: "In particular, States parties must be at liberty to demand that parents provide grounds when applying for exemption from activities that do not immediately appear to be practice of a specific religion or adherence to a different philosophy of life". The State party reiterates that following the 2000-2001 evaluation of the CKREE subject, a general notification form replaced the former application procedure.

11.9 Finally, with reference to the latest international developments, the State party affirms that intercultural and inter-religious dialogue should be encouraged as an integrated part to the children education. According to it, in this context, the CKREE subject appears to be a vital tool in promoting "a common playing field for an increasingly multicultural and diverse generation".

Additional information by the authors

12.1 By letter of 15 October 2004, the authors filed additional observations on State party's latest submission. They re-emphasize that they oppose CKREE because it is not a subject that involves neutral information on different life stances and religions. CKREE involves direct and undisputed religious activities (such as prayers). According to the authors', the CKREE syllabus, combined with the Christian intention clause belies the ratio legis invoked by the State party. The authors do not oppose education with certain "social and ethical" dimensions, but the CKREE methodology was to strengthen the students' religious identity and to teach religious activity within the framework of the Christian intention clause.

12.2 The authors affirm that even if partial exemption arrangements were satisfactory in the majority of cases and only few teachers faced practical problems, this is irrelevant to the present case. The crucial point in the present case is that minority students and their parents experienced the system quite differently.

12.3 The authors contest the State party's objection on the absence of broader opposition to the introduction of the CKREE and argue that practically all religious and life stance minority groups in Norway opposed the subject. They add that the Islamic Council and Muslim parents of Norway filed a lawsuit against the Government, more or less corresponding to their own case, and that they lost their case on grounds similar to the authors' case. It is stated that the Council had decided to await the outcome of the authors' communication before taking any further legal action.

12.4 It is pointed out that large groups of Norwegian society continue to have problems with the partial exemption arrangement. The authors submit a copy of a report prepared in June 2004 by the Norwegian Forum for the Convention of the Rights of the Child, where it invited the CRC to recommend the State party to review its "religious and ethical education both in the state school system and with regard to the requirements for and inspection of private schools, in relation to the CRC's stipulations on freedom of thought, conscience and religion".

12.5 Finally, the authors support the continued promotion of the intercultural dialogue, but affirm that the CKREE does not fulfil this aim.

Issues and proceedings before the Committee

Consideration of admissibility

13.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol.

13.2 The Committee has noted the State party's challenge to the admissibility of the communication on the grounds that the authors would not be "victims" of an alleged human rights violation in the meaning of article 1 of the Optional Protocol. In the Committee's opinion, the authors have shown that they are affected, individually and as families, of the State party's law and practice. Consequently, the Committee finds no reason to declare the communication inadmissible on this ground.

13.3 The State party has contested the admissibility also on the ground that the "same matter" is already being examined by the ECHR as three other sets of parents have lodged a similar complaint with the ECHR and that before the Norwegian courts, the authors' claims for full exemption from the CKREE subject were adjudicated in a single case, along with identical claims from these three other sets of parents. The Committee reiterates its jurisprudence that the words "*the same matter*" within the meaning of article 5, paragraph 2 (a), of the Optional Protocol, must be understood as referring to one and the same claim concerning the same individual, as submitted by that individual, or by some other person empowered to act on his behalf, to the other international body.[11] That the authors' claims were joined with the claims of another set of individuals before the domestic courts does not obviate or change the interpretation of the Optional Protocol. The authors have demonstrated that they are individuals distinct from those of the three sets of parents that filed a complaint with the ECHR. The authors in the present communication chose not to submit their cases to the ECHR. The Committee, therefore, considers that it is not precluded under article 5, paragraph 2 (a), of the Optional Protocol from considering the communication.

13.4 The Committee has taken note of the State party's argument that the claims under articles 17 and 18 were not raised in domestic proceedings, since the authors did not avail themselves of the possibility of applying for partial exemption, and that domestic remedies were not exhausted in that respect. However, both before the Committee and the domestic courts, the authors' claimed that the compulsory nature of the CKREE subject violates their Covenant rights, since cannot apply for full exemption from it. Furthermore, the State party has explicitly confirmed that the claims made in the communication were already assessed by domestic courts. The Committee considers that the authors have exhausted domestic remedies in relation to the claim in question.

13.5 The State party challenged the admissibility of the authors' claim under article 26 because of non-substantiation, since the exemption clause under the Norwegian Education Act applies to all parents, regardless of their religion or life stance. The Committee does not share this view. Consideration of whether there has been a differentiation between Christians and other groups, and whether such differentiation is based on objective and reasonable criteria, would be part of the merits consideration. The Committee considers that the authors have sufficiently demonstrated, for purposes of admissibility, that the exemption arrangements applicable to the CKREE subject may differentiate between non-Christian parents and Christian parents and that such differentiation may amount to discrimination within the meaning of article 26.

13.6 Noting that the authors have withdrawn their claim presented under article 27, the Committee decides that the communication is admissible insofar as it raises issues under articles 17, 18, and 26, of the Covenant.

Consideration of the merits

14.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1 of the Optional Protocol.

14.2 The main issue before the Committee is whether the compulsory instruction of the CKREE subject in Norwegian schools, with only limited possibility of exemption, violates the authors' right to freedom of thought, conscience and religion under article 18 and more specifically the right of parents to secure the religious and moral education of their children in conformity with their own convictions, pursuant to article 18, paragraph 4. The scope of article 18 covers not only protection of traditional religions, but also philosophies of life,[12] such as those held by the authors. Instruction in religion and ethics may in the Committee's view be in compliance with article 18, if carried out under the terms expressed in the Committee's general comment No. 22 on article 18: "*[A]rticle 18.4 permits public school instruction in subjects such as the general history of religions and ethics if it is given in a neutral and objective way*", and "*public education that includes instruction in a particular religion or belief is inconsistent with article 18, paragraph 4 unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents or guardians*." The Committee also recalls its Views in *Hartikainen et al. v. Finland*, where it concluded that instruction in a religious context should respect the convictions of parents and guardians who do not believe in any religion. It is within this legal context that the Committee will examine the claim.

14.3 Firstly, the Committee will examine the question of whether or not the instruction of the CKREE subject is imparted in a neutral and objective way. On this issue, the Education Act, section 2-4, stipulates that: "*Teaching on the subject shall not involve preaching. Teachers of Christian Knowledge and Religious and Ethical Education shall take as their point of departure the object clause of the primary and lower secondary school laid down in section 1-2, and present Christianity, other religions and philosophies of life on the basis of their distinctive* *characteristics. Teaching of the different topics shall be founded on the same educational principles*". In the object clause in question it is prescribed that the object of primary and lower secondary education shall be "in agreement and cooperation with the home, to help to give pupils a Christian and moral upbringing". Some of the *travaux préparatoires* of the Act referred to above make it clear that the subject gives priority to tenets of Christianity over other religions and philosophies of life. In that context, the Standing Committee on Education concluded, in its majority, that: *the tuition was not neutral in value, and that the main emphasis of the subject was instruction on Christianity*. The State party acknowledges that the subject has elements that may be perceived as being of a religious nature, these being the activities exemption from which is granted without the parents having to give reasons. Indeed, at least some of the activities in question involve, on their face, not just education in religious knowledge, but the actual practice of a particular religion (see paragraph 9.18). It also transpires from the research results invoked by the authors, and from their personal experience that the subject has elements that are not perceived by them as being imparted in a neutral and objective way. The Committee concludes that the teaching of CKREE cannot be said to meet the requirement of being delivered in a neutral and objective way, unless the system of exemption in fact leads to a situation where the teaching provided to those children and families opting for such exemption will be neutral and objective.

14.4 The second question to be examined thus is whether the partial exemption arrangements and other avenues provide "*for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents or guardians*". The Committee notes the authors' contention that the partial exemption arrangements do not satisfy their needs, since teaching of the CKREE subject leans too heavily towards religious instruction, and that partial exemption is impossible to implement in practice. Furthermore, the Committee notes that the Norwegian Education Act provides that "on the basis of written notification from parents, pupils shall be exempted from attending those parts of the teaching at the individual school that they, on the basis of their own religion or philosophy of life, perceive as being the practice of another religion or adherence to another philosophy of life".

14.5 The Committee notes that the existing normative framework related to the teaching of the CKREE subject contains internal tensions or even contradictions. On the one hand, the Constitution and the object clause in the Education Act contain a clear preference for Christianity as compared to the role of other religions and worldviews in the educational system. On the other hand, the specific clause on exemptions in section 2-4 of the Education Act is formulated in a way that in theory appears to give a full right of exemption from any part of the CKREE subject that individual pupils or parents perceive as being the practice of another religion or adherence to another philosophy of life. If this clause could be implemented in a way that addresses the preference reflected in the Constitution and the object clause of the Education Act, this could arguably be considered as complying with article 18 of the Covenant.

14.6 The Committee considers, however, that even in the abstract, the present system of partial exemption imposes a considerable burden on persons in the position of the authors, insofar as it requires them to acquaint themselves with those aspects of the subject which are clearly of a religious nature, as well as with other aspects, with a view to determining which of the other aspects they may feel a need to seek - and justify - exemption from. Nor would it be implausible to expect that such persons would be deterred from exercising that right, insofar as a regime of partial exemption could create problems for children which are different from those that may be present in a total exemption scheme. Indeed as the experience of the authors demonstrates, the system of exemptions does not currently protect the liberty of parents to ensure that the religious and moral education of their children is in conformity with their own convictions. In this respect, the Committee notes that the CKREE subject combines education on religious knowledge with practising a particular religious belief, e.g. learning by heart of prayers, singing religious hymns or attendance at religious services (para 9.18). While it is true that in these cases parents may claim exemption from these activities by ticking a box on a form, the CKREE scheme does not ensure that education of religious knowledge and religious practice are separated in a way that makes the exemption scheme practicable.

14.7 In the Committee's view, the difficulties encountered by the authors, in particular the fact that Maria Jansen and Pia Suzanne Orning had to recite religious texts in the context of a Christmas celebration although they were enrolled in the exemption scheme, as well as the loyalty conflicts experienced by the children, amply illustrate these difficulties. Furthermore, the requirement to give reasons for exempting children from lessons focusing on imparting religious knowledge and the absence of clear indications as to what kind of reasons would be accepted creates a further obstacle for parents who seek to ensure that their children are not exposed to certain religious ideas. In the Committee's view, the present framework of CKREE, including the current regime of exemptions, as it has been implemented in respect of the authors, constitutes a violation of article 18, paragraph 4, of the Covenant in their respect.

14.8 In view of the above finding, the Committee is of the opinion that no additional issue arises for its consideration under other parts of article 18, or articles 17 and 26 of the Covenant.

15. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 18, paragraph 4, of the Covenant.

16. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective and appropriate remedy that will respect the right of the authors as parents to ensure and as pupils to receive an education that is in conformity with their own convictions. The State party is under an obligation to avoid similar violations in the future.

17. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] Paragraph 2 (4) of the Education Act reads as follows: "Section 2-4. Teaching the subject CKREE. Exemption from regulations, etc: Teaching in CKREE shall:

- Provide a thorough knowledge of the Bible and Christianity both as cultural heritage and Evangelical-Lutheran faith;
- Provide knowledge of other Christian denominations;
- Provide knowledge of other world religions and philosophies of life, ethical and philosophical topics;
- Promote understanding and respect for Christian and humanist values and;
- Promote understanding, respect and the ability to carry out a dialogue between people with different views concerning beliefs and philosophies of life.

CKREE is an ordinary school subject that shall normally be attended by all pupils. Teaching in the subject shall not involve preaching.

Teachers of CKREE shall tale as their point of departure the objects clause of the primary and lower secondary school laid down in section 1-2, and present Christianity, other religions and philosophies of life on the basis of their distinctive characteristics. Teaching of the different topics shall be founded on the same educational principles.

On the basis of written notification from parents, pupils shall be exempted from attending those parts of the teaching at the individual school that they, on the basis of their own religion or philosophy of life, perceive as being the practice of another religion or adherence to another philosophy of life. This may involve religious activities either in or outside the classroom. In cases where exemption is notified, the school shall, as far as possible and especially in the lower primary school, seek solutions involving differentiated teaching within the curriculum.

Pupils who have reached the age of 15 may themselves give written notification pursuant to the fourth paragraph."

[2] *Sanchez López v. Spain* (777/1997), decision adopted on 22 October 1996.

[3] Education Act, sect. 2-4, paras. 1-3.

[4] Communication No. 40/1978, Views adopted on 9 April 1981.

[5] See footnote No. 1 above.

[6] Education Act, sect. 2-4, para. 4.

[7] Public Administration Act (1967), sect. 13.

[8] *Fanali v. Italy* (75/1980), Views adopted on 31 March 1983, and *Blom v. Sweden* (191/1985), Views adopted on 4 April 1988.

[9] The State party provides the English translation of Circular F-03-98 (12 January 1998) and excerpts of recommendation No. 15 for 1995-1996 from the Education Committee from the Storting (the Norwegian Parliament).

[10] European Court for Human Rights, applications nos. 5095/71, 5920/72 and 5926/72.

[11] *Sanchez Lopez v. Spain*, (777/1997), decision adopted on 22 October 1996.

[12] General comment No. 22 on article 18, adopted on 30 July 1993.

Y. Communication No. 1189/2003, *Fernando v. Sri Lanka* (Views adopted on 31 March 2005, eighty-third session)*

Submitted by:	Anthony Michael Emmanuel Fernando (represented by counsel, Kishali Pinto-Jayawardena and Suranjith Hewamanne)
Alleged victim:	The author
State party:	Sri Lanka
Date of communication:	10 June 2003 (initial submission)
Subject matter:	Fair trial in criminal contempt case, torture, death threats and personal security
Procedural issues:	Non-exhaustion of domestic remedies; lack of substantiation
Substantive issues:	Fair trial procedures in criminal contempt case; extent of State party's responsibility for investigating death threats and protecting the subject of such threats
Articles of the Covenant:	7, 9, 10, paragraph 1, 14, paragraphs 1, 2, 3, (a), (b), (c), (d), (e), and 5, and 19, and 2, paragraph 3
Articles of the Optional Protocol:	2, 3, 5 paragraph 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 31 March 2005,

Having concluded its consideration of communication No. 1189/2003, submitted to the Human Rights Committee on behalf of Mr. Anthony Michael Emmanuel Fernando under the Optional Protocol to the International Covenant on Civil and Political Rights,

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Ahmed Tawfik Khalil, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Mr. Anthony Michael Emmanuel Fernando, a Sri Lankan national currently seeking asylum in Hong Kong. He claims to be a victim of violations by Sri Lanka of his rights under articles 7, 9, 10, paragraph 1, 14, paragraphs 1, 2, 3, (a), (b), (c), (d), (e), 5, and articles 19, and 2, paragraph 3, of the Covenant on Civil on Civil and Political Rights. He is represented by counsel, Kishali Pinto-Jayawardena and Suranjith Hewamanne.

1.2 A request for interim measures to release the author from prison in Sri Lanka, submitted at the same time as the communication, was denied by the Special Rapporteur on new communications.

Factual background

2.1 The author filed a workers compensation claim with the Deputy Commissioner of Worker's Compensation, for redress in respect of injuries he had suffered. According to the Court proceedings, the author was an employee of the Young Men's' Christian Association (Y.M.C.A). While engaged in that employment he suffered injuries as a result of a fall. The Deputy Commissioner of Workmen's Compensation held an inquiry into the incident. The author and the Y.M.C.A were represented by lawyers. A settlement was arrived at but when the matter was called before the Deputy Commissioner on 9 January 1998, the author refused to accept the settlement. The author's claim was thereafter dismissed and following the rejection of his claim, the author filed four successive motions in the Supreme Court. The first two motions concerned alleged violations of his constitutional rights by the Deputy Commissioner of Worker's Compensation. On 27 November 2002, the Supreme Court considered these two motions jointly and dismissed them. Thereafter, on 30 January 2003, the author filed a third motion, claiming that the first two motions should not have been heard jointly, and that their consolidation violated his constitutional right to a "fair trial". On 14 January 2003, this motion was similarly dismissed.

2.2 On 5 February 2003, the author filed a fourth motion, claiming that the Chief Justice of Sri Lanka and the two other judges who had considered his third motion should not have done so, as they were the same judges who had consolidated and considered the first two motions. During the hearing of this motion on 6 February 2003, the author was summarily convicted of contempt of court and sentenced to one year's "rigorous imprisonment" (meaning that he would be compelled to perform hard labour). He was imprisoned on the same day. According to the author, approximately two weeks later, a "second" contempt order was issued by the Chief Justice, clarifying that, despite earlier warnings, the author had persisted in disturbing court proceedings. The operative part of the Order stated as follows: "The petitioner was informed that he cannot abuse the process of Court and keep filing applications without any basis. At this stage he raised his voice and insisted on his right to pursue the application. He was then warned that he would be dealt with for contempt of Court if he persists in disturbing the proceedings of Court. In spite of the warning, he persists in disturbing the proceedings of Court. In the circumstances, we find him guilty of the offence of contempt of Court and sentence him to one year rigorous imprisonment. The Registrar is directed to remove the Petitioner from Court and commit him to prison on the sentence that is imposed". The Order was based on article 105 (3) of the Sri Lankan Constitution, which confers on the Supreme Court "the power to punish for contempt of itself, whether committed in the court itself or elsewhere, with imprisonment or fine or both as the court may deem fit….".[1] According to the author, neither the Constitution nor any other statutory provisions regulate the procedure for informing the person in contempt of the charges against him, so as to enable him to consult a lawyer or appeal against the order of the Supreme Court, nor does it specify the sentence that may be imposed in cases of contempt.

2.3 Following his imprisonment, the author developed a serious asthmatic condition which required his hospitalization in an intensive care unit. On 8 February 2003, he was transferred to a prison ward of the General Hospital, where he was made to sleep on the floor with his leg chained, and only permitted to move to go to the toilet. He developed a chill from lying on the floor, which worsened his asthmatic condition. Neither the author's wife nor his father was informed that he had been transferred to hospital; they had to make their own enquiries.

2.4 On 10 February 2003, the author experienced severe pain all over his body but was not given medical attention. On the same day, he was returned to prison and was assaulted several times by prison guards during his transfer. In the police van, he was repeatedly kicked on the back, causing damage to his spinal cord. On arrival at the prison, he was stripped naked and left lying near the toilet for more than 24 hours. When blood was noticed in his urine, he was returned to the hospital, where he was subsequently visited by the United Nations Special Rapporteur on the independence of the judges and lawyers, who expressed concern about the case. After 11 February 2003, the author was allegedly unable to rise from his bed. On 17 October 2003, he was released from prison, after completing 10 months of his sentence. The Sri Lankan authorities brought criminal charges against the prison guards accusing them of having been involved in the assault of the author. They have since been released on bail, pending trial.

2.5 On 14 March 2003, the author filed a fundamental rights petition under article 126 of the Constitution with respect to his alleged torture, which is currently pending in the Supreme Court. He also submitted an appeal against his conviction for contempt, on the grounds that no charge was read out to him before conviction and that the sentence was disproportionate. He also submitted that the matter should not be heard by the same judges, since they were biased. The appeal was heard by the same three judges who had convicted him and was dismissed on 17 July 2003.

The complaint

3.1 The author claims violations of his rights under article 14, paragraphs 1, 2, and 3 (a), (b), (c) and (e), and 5, in that: he was denied a hearing on the question of contempt, having been convicted summarily; conviction and sentence were handed down by the same judges who had considered his previous three motions,[2] he had not been informed of the charges against him, nor given adequate time for the preparation of his defence,[3] the appeal was heard by the same Supreme Court judges who had previously considered the matter; there was no proof that he had committed contempt of court or that "a deliberate intention" to commit contempt, required under domestic law, had been established; the term of one year imprisonment was grossly disproportionate to the offence which he was found to have committed.

3.2 The author claims that the fact that the same judges heard all his motions was contrary to domestic law. According to the author, section 49 (1) of the Judicature Act No. 2 of 1978 (as amended) stipulates that no judge shall be competent, and in no case shall any judge be compelled to exercise jurisdiction in any action, prosecution, proceedings or matter in which he is a party or is personally interested. Subsection (2) of the section provides that no judge shall hear an appeal from, or review, any judgement, sentence or order passed by himself. Subsection (3) provides that where any judge who is a party or personally interested, is a judge of the Supreme Court or the Court of Appeal, the action, prosecution or matter to or in which he is a party or is interested, or in which an appeal from his judgement shall be preferred, shall be heard or determined by another judge or judges of the court. In support of the author's view that the trial was unfair he refers to international and national concern regarding the conduct of the Chief Justice.[4]

3.3 The author argues that his imprisonment without a fair trial amounts to arbitrary detention, in violation of article 9 of the Covenant. He refers to the criteria under which the Working Group on Arbitrary Detention determines whether a deprivation of liberty is arbitrary.

3.4 The author claims that his freedom of expression under article 19 was infringed by the imposition of a disproportionate prison sentence, given that the exercise of contempt powers was neither "prescribed by law", (given the insufficient precision of the relevant provisions), nor "necessary to protect the administration of justice" or "public order" (art. 19 (3) (b)), in the absence of an abusive behaviour on his part that could be considered as "scandalizing the court". He argues that his treatment and the consequent restrictions of his freedom of expression did not meet the three preconditions for a limitation:[5] it must be provided by law; it must address one of the aims set out in paragraphs 3 (a) and (b) of article 19; and it must be necessary to achieve a legitimate purpose.

3.5 On the first condition, the author argues that the restriction is not provided by law, as the measures in question are not clearly delineated and so wide in their ambit that they do not meet the test of certainty required for any law. He invokes the case law of the European Court on Human Rights for the proposition that the legal norm in question must be accessible to individuals, in that they must be able to identify it and must have a reasonable prospect of anticipating the consequences of a particular action.[6] The State party's laws on contempt are opaque, inaccessible and the discretion for the Supreme Court to exercise its own powers of contempt is so wide and unfettered that it fails the test of accessibility and predictability.

3.6 On the second condition, it is argued that the latitude afforded to the judiciary regarding its powers of contempt under Sri Lankan law, and the extent to which they operate as a restriction on the right to freedom of expression, are not sufficiently closely related to the aims specified in article 19, namely the protection of "public order" and "the rights and reputation of others". On the third condition, while the right to freedom of expression may be restricted, "to protect the rights and reputations of others", and in this instance, to safeguard the administration of justice, the powers of the Supreme Court provided for under Sri Lankan law for contempt of court, including the power to impose prison sentences, are wholly disproportionate and cannot be justified as being "necessary" for this end. Even if the Committee were to find that there is a pressing social need in this case (to secure the administration of justice) and that the author was in fact in contempt, one year of imprisonment - with hard labour - is in no way a proportionate or necessary response.[7]

3.7 The author claims that article 105 (3) of the Sri Lankan Constitution is in itself incompatible with articles 14 and 19 of the Covenant. He claims violations of articles 7 and 10, paragraph 1, in relation to his assault and his conditions of his detention (paragraph 2.3 and 2.4 above). He also claims that in having submitted his appeal against his conviction for contempt, he has exhausted all available domestic remedies.

The State party's admissibility submission

4.1 On 27 August 2003, the State party provided its comments on the admissibility of the communication. It submits that the appeal judgement, of 17 July 2003, of the Supreme Court on the author's conviction for contempt, deals with the entirety of the case; it is significant that the author failed to express regret for this "contemptuous behaviour", though given an opportunity to do so by Court, and thereby exhibiting his contempt of justice and the judiciary.

4.2 With regard to the alleged torture by the Prison Authorities, the State party confirms that it had taken measures to charge the persons held responsible, that the case is still pending and that the accused are currently on bail, pending trial. There are two cases pending before the courts. If the accused are convicted they will be sentenced. Further, it is confirmed that the author has filed a fundamental rights petition in the Supreme Court against the alleged torture, which remains pending. In the event that the Supreme Court decides the fundamental rights application in the author's favour he will be entitled to compensation. As such, the allegation of torture is inadmissible for failure to exhaust domestic remedies. Further, since the State took all possible steps to prosecute the alleged offenders there can be no cause for further complaint against the State in this regard.

4.3 The State party adds that the Sri Lankan Constitution provides for an independent judiciary. The judiciary is not under the State's control and as such the State cannot influence nor give any undertaking or assurances on behalf of the judiciary on the conduct of any judicial officer. If the State attempts to influence or interfere with the judicial proceedings, this would be tantamount to an interference with the judiciary and would lead to any officer responsible facing charges of contempt himself.

4.4 Although the State party requested the Committee to consider the admissibility separately from the merits of the communication, the Committee advised, through its Special Rapporteur on new communications, that it would consider the admissibility and merits of the communication together, on the basis that the State party's future submissions on the merits would provide greater clarity on the issues of admissibility and that the information provided was too scarce for any final determination on these issues at that point.

Interim measures request

5.1 On 15 December 2003, following the receipt of death threats, the author requested interim measures of protection, requesting the State party to adopt all necessary measures to ensure his protection and that of his family, and to ensure that an investigation into the threats and other measures of intimidation be initiated without delay. He submits that on 24 November 2003, at about 9. 35 a.m., an unknown person called his mother and asked her whether he was at home. When she answered in the negative, this person made death threats against the author and demanded that he withdraw his three complaints: The communication to the Human Rights Committee; the fundamental rights case in the Supreme Court regarding alleged torture; and the complaint filed in the Colombo Magistrate's Court against the two Welikade prison guards. The caller did not reveal his identity.

5.2 On 28 November 2003, the author's complaint against the two prison guards was taken up in the Colombo Chief Magistrate's court, and the author was present. The magistrate directed the police to charge the accused on 6 February 2004, as they had failed on three occasions to present themselves before the Maligakanda Mediation Board, as directed by the court. Later that day on 28 November 2003, his mother told him that an unidentified person had come to the house at about 11.30 a.m. and, while standing outside the locked gate, had called out for the author. When the author's mother told him that he was not in, he went away threatening to kill him. Once again, on 30 November 2003, at about 3.30 p.m., the same person returned, behaved in the same threatening manner and demanded that the author's mother and father send their son out of the house. The author's parents did not respond and called the police. Before the police arrived, the person uttered threats against the author's parents and after once again threatening to kill the author left the premises. The author's mother filed a complaint at the police station on the same day.

5.3 On 24 November 2003, at 10.27 a.m., an unidentified person called at the office of a Sri Lankan newspaper, Ravaya, which had supported the author throughout his ordeal. The caller spoke to a reporter and levelled death threats against him and the editor of Ravaya, demanding that they cease publishing further news concerning the author. This newspaper had published interviews of the author on 16 and 23 February and 2 November 2003 regarding the alleged miscarriage of justice suffered by him. The threats were reported in the weekend edition of the Ravaya newspaper.

5.4 The author adds that, on 4 December 2003, he received information to the effect that the two prison guards who had been cited in the fundamental rights petition filed by the author as well as in the case filed in the Colombo Magistrate's court, had been reinstated: one of them was transferred to the New Magazine prison and the other remains at the Welikade prison. As a result, the author lives in daily fear for his life as well as for the life and safety of his wife, his son and his parents. In spite of his complaint to the authorities, he has not, to date, received any protection from the police and is unaware of what action has been taken to investigate the threats against himself and his family. He recalls that he had received death threats in prison as well; he invokes the Committee's concluding observations, of November 2003, which stated that, "The authorities should diligently enquire into all cases of suspected intimidation of witnesses and establish a witness protection program in order to put an end to the climate of fear that plagues the investigation and prosecution of such cases." He also refers to the Committee's Views in *Delgado Paez v. Colombia* on the State party's obligation to investigate and protect subjects of death threats.[8]

5.5 On 9 January 2004, pursuant to rule 86 of the rules of procedure and, on the behalf of the Committee, the Special Rapporteur on new communications requested the State party to adopt all necessary measures to protect the life, safety and personal integrity of the author and his family, so as to avoid irreparable damage to them, and to inform the Committee on the measures taken by the State party in compliance with this decision within 30 days from the date of the note verbale, i.e. not later than by 9 February 2004.

5.6 On 3 February 2004, the author submitted that on the morning of 2 February 2004, he had been subjected to an attack by an unknown assailant who sprayed chloroform in his face. A van pulled up close by during the attack, and the author believes that it was going to be used to kidnap him. He managed to escape and was taken to hospital. Had he not escaped, he would have been the victim of an assassination or disappearance. On 13 February 2004, the Committee, through its Special Rapporteur on new communications, reiterated his previous request to the State party under rule 86 of the Committee's rules of procedure in his note of 9 January 2004.

5.7 On 19 March 2004, the State party commented on the attack against the author of 2 February 2004. It submits that the Attorney General's Department directed the police to investigate the alleged attack and to take measures necessary to ensure his safety. The police recorded his statement in which he was unable to either name the suspects or to provide the police with the number of the vehicle that the alleged assailants had travelled in. The investigations remain in progress and steps will be taken to inform the author of the outcome. If the investigations reveal credible evidence that the threats were caused by any person with a view to subverting the course of justice, the State party will take appropriate action.

5.8 With regard to the author's security, a police patrol book has been placed at his residence and police patrol have been directed to visit his residence day and night and to record their visits in the police patrol book. In addition to this, his residence is kept under surveillance by plain-clothed policemen. There is no evidence to conclude that the author received threats to his life because of his communication to the Human Rights Committee.

The State party's merits submission

6.1 On 16 March 2004, the State party provided its submissions on the merits. On the alleged violations of articles 9, 14 and 19 of the Covenant, it concedes that the author has exhausted domestic remedies. It refers to the judgement of the Supreme Court of 17 July 2003, on appeal against the contempt order, and submits that it cannot comment on the merits of any judgement given by a competent Sri Lankan Court. The State party relies on the arguments set out in the judgement for its proposition that the author's rights were not violated. It submits that the manner in which the author behaved from the time he walked out on a settlement reached between himself and the Y.M.C.A, where both parties were legally represented, before the Deputy Commissioner General of Workman's Compensation, to the point of his refusal to express any regret for his behaviour, when his case for contempt was reviewed by the Supreme Court, demonstrates the author's lack of respect for upholding the dignity and decorum of a judicial tribunal. It refers to the judges' consideration of the powers vested in such Courts to deal with cases of contempt, noting that in such cases committed in the face of the Court punishment may be imposed summarily. While the author was given an opportunity to mitigate the sentence by way of apology, he failed to do so.

6.2 Freedom of speech and expression, including publication, are guaranteed under article 14, paragraph 1 (a), of the Sri Lankan Constitution. Under article 15, paragraph 2, it is permissible to place restrictions on rights under article 14; these may be prescribed by law in relation to contempt of court. The State party denies that the power of the Supreme Court under article 105, paragraph 3 of the Constitution is inconsistent with either the fundamental right guaranteed by article 14, paragraph 1 (a) of the Sri Lankan Constitution or with articles 19 or 14 of the Covenant.

6.3 The State party reiterates that the author did not exhaust domestic remedies with respect to the claim relating to torture and ill-treatment as the case is still pending. Since the State cannot make submissions on behalf of the accused, it would be tantamount to a breach of rules of natural justice for the Committee to express its views on the alleged violation, as there is no opportunity for the persons accused of the assault to give their version of the incident. A determination of the case by the Committee at this stage would be prejudicial to the accused and/or the prosecution. It observes that the author has not submitted that such remedies are ineffective or that such remedies would be unreasonably prolonged.

6.4 The State party notes that the fundamental rights case filed by the author in the Supreme Court remains pending, and that a violation of the same rights as those protected under articles 7 and 10, paragraph 1, of the Covenant will be considered in these proceedings. It further submits that it has declined to appear for the individuals against whom allegations of torture are made. The Attorney-General who represents the State refrains, as a matter of policy, from appearing for public officers against whom allegations of torture are pending, since the Attorney-General could consider filing criminal charges against the perpetrators even after such a case is concluded. In the present case such action (criminal prosecution) is pending.

The author's comments on admissibility and the merits

7.1 On 6 August 2004, the author commented on the State party's submission and reiterated his earlier claims. Following the attack on him of 2 February 2004, he lived in hiding. Despite having made complaints to the police, no investigations were made, and no one was prosecuted or arrested. Although the author concedes that police patrols did pass by his house he argues that this is insufficient protection from an attempted kidnapping and possibly attempted murder. He was diagnosed with post-traumatic stress disorder and his mental health deteriorated. Because of these events, he left Sri Lanka on 16 July 2004 and applied for asylum in Hong Kong, where he continues to receive treatment for his mental difficulties. His application has not yet been considered. He contests the State party's view that it has no role to play with regard to a judgement pronounced by a local court of law.

7.2 Contrary to his initial submission, the author now contends that no charges have been filed against the suspects of the alleged assault to date. According to him, preliminary reports called "B reports" have been before the Magistrate's Court in Colombo, but these are merely reports relating to the progress of the inquiries. The last time this report was heard by the Court was on 23 July 2004. Thus, even after one and a half years after the incident, the inquiry is supposed to be continuing. In the author's view, this failure by the State party promptly to investigate complaints of torture violates article 2, and the lack of witness protection makes it impossible to participate in any trial that may eventually take place.

7.3 The author also claims that the State party has failed to contribute to his rehabilitation. He states that four doctors have diagnosed him with psychological trauma caused by the above events, but that his fundamental rights and request for compensation application filed on 13 March 2003 has been postponed constantly. According to article 126 (5) of the Constitution, "[t]he Supreme Court shall hear and finally dispose of any petition or reference under this article within two months of the filing of such petition or the making of such reference". The author's petition remains pending. The State party's failure to consider these applications are also said to demonstrate that exhaustion of domestic remedies with respect to the alleged violations of articles 7 and 10, paragraph 1 has been unduly prolonged, and that the remedies are ineffective.

7.4 The author adds a new claim relating to his conviction for contempt, that he was not given an opportunity to be tried and defend himself in person, or through legal assistance of his own choosing and he was not informed of the right to have legal assistance, nor was legal assistance assigned to him. In this regard he claims a violation of article 14, paragraph 3 (d).

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

8.2 As to the alleged violation of articles 7 and 10, paragraph 1, with respect to the author's alleged torture and his conditions of detention, the Committee notes that these issues are currently pending before both the Magistrate Court and the Supreme Court. Although it is unclear whether the individuals allegedly responsible for the assault have been formally charged, it is uncontested that this matter is under review by the Magistrates Court. The Committee is of the view that a delay of 18 months from the date of the incident in question does not amount to an unreasonably prolonged delay within the meaning of article 5, paragraph 2 (b), of the Optional Protocol. The Committee therefore finds these claims inadmissible for non-exhaustion of domestic remedies in accordance with article 5, paragraph 2 (b) of the Optional Protocol.

8.3 As to the claim that the author's detention was arbitrary under article 9, since it was ordered after an allegedly unfair trial, the Committee finds that this claim is more appropriately dealt together with article 14 of the Covenant as it relates to post-conviction detention.

8.4 As to the alleged violation of article 14, paragraph 3 (c), the Committee finds that this claim has not been substantiated for the purpose of admissibility and is therefore inadmissible under article 2 of the Optional Protocol.

8.5 As to the remaining claims of violations of articles 9, paragraph 1, and 14, paragraphs 1, 2, 3 (a), (b), (d), (e), and 5, and article 19, the Committee considers these claims are sufficiently substantiated and finds no other bar to their admissibility.

Consideration of the merits

9.1 The Human Rights Committee has considered the present communication in light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

9.2 The Committee notes that courts notably in Common Law jurisdictions have traditionally enjoyed authority to maintain order and dignity in court debates by the exercise of a summary power to impose penalties for "contempt of court." But here, the only disruption indicated by the State party is the repetitious filing of motions by the author, for which an imposition of financial penalties would have evidently been sufficient, and one instance of "rais[ing] his voice" in the presence of the court and refusing thereafter to apologize. The penalty imposed was a one year term of "Rigorous Imprisonment". No reasoned explanation has been provided by the court or the State party as to why such a severe and summary penalty was warranted, in the exercise of a court's power to maintain orderly proceedings. Article 9, paragraph 1, of the Covenant forbids any "arbitrary" deprivation of liberty. The imposition of a draconian penalty without adequate explanation and without independent procedural safeguards falls within that prohibition. The fact that an act constituting a violation of article 9, paragraph 1 is committed by the judicial branch of government cannot prevent the engagement of the responsibility of the State party as a whole. The Committee concludes that the author's detention was arbitrary, in violation of article 9, paragraph 1. In the light of this finding in the present case, the Committee does not need to consider the question whether provisions of article 14 may have any application to the exercise of the power of criminal contempt. Similarly, the Committee does not need to consider whether or not there was a violation of article 19.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the State party has violated articles 9, paragraph 1, of the International Covenant on Civil and Political Rights.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an adequate remedy, including compensation, and to make such legislative changes as are necessary to avoid similar violations in the future. The State party is under an obligation to avoid similar violations in the future.

12. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2, of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] "Article 105 (3), provides that "The Supreme Court of the Republic of Sri Lanka and the Court of Appeal of the Republic of Sri Lanka shall each be a superior court of record and shall have all the powers of such court including the power to punish for contempt of itself, whether committed in the court itself or elsewhere, with imprisonment or fine or both as the court may deem fit. The power of the Court of Appeal shall include the power to punish for contempt of any other court, tribunal or institution referred to in paragraph (1) (c) of this article, whether committed in the presence of such court or elsewhere: Provided that the preceding provisions of this article shall not prejudice or affect the rights now or hereafter vested by any law in such other court, tribunal or institution or punishment for contempt of itself."

[2] The author refers to *Karttunen v. Finland*, case No. 387/1989 and *Gonzalez del Rio v. Peru*, case No. 263/1987. He also distinguishes the current case from that of *Rogerson v. Australia*, case No. 802/1998 and *Collins v. Jamaica*, case No. 240/1987.

[3] He refers to a press release of 17 February 2003, in which it is stated that the United Nations Special Rapporteur on the independence of the judges and lawyers and the Sri Lankan Legal Profession, are of the view that contempt of court cases are not an exception to the right of an accused to present a defence.

[4] Report of the United Nations Special Rapporteur on the independence of judges and lawyers to the United Nations Commission in April 2003, in which it states that "the Special Rapporteur continues to be concerned over the allegations of misconduct on the part of the Chief Justice Sarath Silva, the latest being the proceedings filed against him and the Judicial Service Commission in the Supreme Court by two district judges …" He also refers to the Report of the International Bar Association, 2001, Sri Lanka on failing to protect the rule of law and the independence of the judiciary.

[5] *Faurisson v. France*, case No. 550/93.

[6] *Grigoriades v. Greece* (24348/94) and *Sunday Times v. The United Kingdom* (6538/74) 1979.

[7] The author refers to the European Court of Human Right's case of *De Haes and Gijsels v. Belgium*.

[8] *Delgado Paez v. Colombia*, case No. 195/1985 - "States parties have undertaken to guarantee the rights enshrined in the Covenant. It cannot be the case that, as a matter of law, States can ignore known threats to the life of persons under their jurisdiction, just because he or she is not arrested or otherwise detained. States parties are under an obligation to take reasonable and appropriate measures to protect them …"

Z. Communication No. 1207/2003, *Malakhovsky v. Belarus* (Views adopted on 26 July 2005, eighty-fourth session)*

Submitted by: Sergei Malakhovsky and Alexander Pikul (not represented by counsel)

Alleged victim: The authors

State party: Belarus

Date of communication: 24 July 2003 (initial submission)

Subject matter: Refusal to register a religious association and consequent limitations on the association's activities

Substantive issues: Right to manifest one's beliefs and to associate with others; whether limitations are necessary and proportionate

Articles of the Covenant: 18 (1), 18 (3), 22 (1), 22 (2)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 26 July 2005,

Having concluded its consideration of communication No. 1207/2003, submitted to the Human Rights Committee by Sergei Malakhovsky and Alexander Pikul under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

The text of an individual opinion signed by Committee member Ms. Ruth Wedgwood is appended to the present document.

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The authors of the communication are Mr. Sergei Malakhovsky and Mr. Alexander Pikul, citizens of Belarus, born in 1953 and 1971 respectively. They claim to be victims of violations by Belarus of article 18, paragraphs 1 and 3, and article 22, paragraphs 1 and 2 of the International Covenant on Civil and Political Rights. They are not represented by counsel.

1.2 The Covenant and the Optional Protocol entered into force for Belarus on 23 March 1976 and 30 December 1992, respectively.

Factual background

2.1 The authors are members of the Minsk Vaishnava community (community of Krishna consciousness), one of seven such communities registered in Belarus. The applicable law distinguishes between a registered religious community and a registered religious association. The authors state that certain activities which are essential to the practice of their religion may only be undertaken by a religious association. According to the domestic statute on "freedom of conscience and religious organizations" ("the Statute"), and the Decree of the Council of Ministers on "approval of invitation of foreign clerics and their activity in Belarus" ("the Decree"), only religious associations are entitled to establish monasteries, religious congregations, religious missions and spiritual educational institutions, or invite foreign clerics to visit the country for the purposes of preaching or conducting other religious activity.

2.2 On 10 May 2001, the authors filed an application with the Committee on Religions and Nationalities ("the C.R.N."), seeking the registration of the seven Krishna communities in Belarus as a religious association. The application included a draft statute and other pertinent documentation required by law, including documents identifying an officially approved "legal address" of the association, 11 Pavlova Street, Minsk, which satisfied all relevant requirements under the Housing Code, including regulations regarding fire and sanitation facilities.

2.3 On 5 June 2001, the C.R.N. returned these documents with a direction that certain changes be made. The authors resubmitted the documents, but on 27 July 2001, they were returned again with a direction for further changes. On each occasion, most of the required changes were not based on applicable laws, and appeared to reflect the personal views of the officials processing the application. The authors submitted the documents for a third time on 11 August 2001.

2.4 Although the Statute required the authors' application to be determined within one month, a period of over a year elapsed after the documents were initially filed, without any decision from the C.R.N. On 30 May 2002, the authors filed an application in the Central Court of Minsk seeking an order to direct the C.R.N. to determine their application. On 4 July 2002, the Court issued an order requiring the C.R.N. to decide on the authors' application within a month.

2.5 On 2 August 2002, the C.R.N. refused the authors' application, on the ground that they had not provided a proper legal address. It found that the earlier decision of the Central Regional Administration of the City of Minsk to approve the legal address for the religious association was invalid, as it had been based on an earlier decision of the Minsk City Executive Committee, which, by virtue of another law, did not apply to the registration of religious organizations.

2.6 As a result of the C.R.N.'s refusal to register the association, members of the seven Krishna communities, including the authors, have been deprived of the right to establish spiritual educational institutions to train their priests, making it impossible to support religious doctrine appropriately. They cannot invite foreign priests to visit the country, resulting in a decline of spiritual standards due to their inability to associate with more spiritually advanced believers. They have also been unable to create monasteries and missions, for the purpose of realizing certain essential tenets of their religion.

2.7 On 24 September 2002, the authors appealed the C.R.N.'s refusal to register the association in the Central District Court of Minsk; the appeal was dismissed on 18 October 2002. On 29 October 2002, they filed a cassation appeal in the Minsk City Court; the appeal was dismissed on 28 November 2002. On 21 December 2002, the authors filed an application for supervisory review with the President of the Minsk City Court; this was dismissed on 17 February 2003. On 14 April 2003, they filed an application for supervisory review in the Supreme Court of Belarus; this was dismissed on 30 May 2003. The grounds for the dismissal of the appeals were twofold: first, the absence of a proper legal address, for the reasons mentioned in the C.R.N.'s decision (paragraph 2.5 above); secondly, the premises did not comply with the requirements of the Housing Code, as several violations of sanitary and fire safety measures had been identified.

2.8 The authors submit that that the decision of the administrative body to approve the legal address of their association was never set aside, and remains in force. They acknowledge that the earlier decision of the Minsk City Executive Committee, on which the decision to approve their legal address was based, was not applicable to the registration of religious bodies, but argue that it was simply irrelevant, and that the premises only needed to comply with relevant provisions of the Housing Code, which it did. As to concerns about the fire safety and sanitation facilities of the premises, the authors note that the building is residential, that people are living in it, and that it cannot be argued that the building is safe for these residents but unsafe for their organization.

2.9 The authors submit that amendments to the Statute adopted on 31 October 2002 make it even more difficult to have a religious association registered. The Statute now requires that an association be comprised of at least 10 religious communities, of which at least one must have conducted its activities in Belarus for not less than 20 years.

The complaint

3.1 The authors submit that the refusal of the C.R.N. to register their religious association, and the failure of domestic judicial instances to uphold their appeals, together with the consequences which flow from these decisions, amount to a violation of their rights under article 18, paragraphs 1 and 3, and article 22, paragraphs 1 and 2. They note that the process of unsuccessfully pursuing the registration of the association took two years, which is said to be evidence of a discriminatory policy of the State party towards religious minorities.

3.2 The authors contend that the requirements for the registration of a religious association established under the State party's laws are unwarranted limitations of their right to manifest their religion and restrictions on the exercise of their freedom of association with others which do not meet the criteria of necessity to "protect public safety, order, health, or morals, or the fundamental rights and freedoms of others", as provided for in articles 18, paragraph 3, and the corresponding provision in article 22, paragraph 2, of the Covenant.

The State party's observations on admissibility and merits

4.1 In its observations dated 29 April 2004, the State party submits that the communication does not reveal any violation of articles 18 or 22 of the Covenant. It notes that the authors are able to practice their religion unobstructed both personally and in association with others. Since 1992, the authors have actively participated in the Minsk Krishna community, which has been registered in accordance with law. The seven existing Krishna communities in Belarus have an autonomous status and are not subject to religious control.

4.2 The State party confirms that on 16 November 2002, amendments to the Statute introduced new requirements for registration of a religious association, which require such an association to have 10 or more communities, at least one of which must have been conducting activities within Belarus for a period of 20 years or more.

4.3 In relation to the authors' application for registration, the State party notes that the first two applications did not comply with legal requirements. In relation to the third application, the C.R.N. was required to examine thoroughly the association's statute, teachings and activities, as its stated objectives and tasks were significantly different from those of the seven religious communities of which it was comprised. In particular, the draft constitution of the association stated that the new body aspired to making the International Society of Krishna Consciousness, which is only one of many branches of Vishnu Hinduism, the only religious organization representing Vishnuism in Belarus.

4.4 The State party confirms that a key requirement for the registration of religious associations is that the body in question must have an approved legal address. The authors' application referred to a housing block at 11 Pavlova Street in Minsk. The State party's Housing Law provides that any non-residential use of housing estates must be carried out with the agreement of local authorities, and in accordance with rules governing sanitary conditions and fire safety; inspection of the premises by the authorities revealed violations of these norms. The State party notes that the authors proposed to use the site for collective purposes - religious ceremonies, rituals and other group undertakings, which require particular safety arrangements and strict compliance with relevant standards. Thus an inspection of the premises after a wedding ceremony on 25 May 2002 revealed that open fires had been used on the premises.

4.5 The State party submits that the courts which examined the authors' appeals were correct in their assessment that the administrative decision which had approved the use of the premises as the association's legal address had been taken without the required inspection of the premises, and in violation of the housing laws referred to above. In any event, this administrative body had no jurisdiction in relation to religious and social associations. Accordingly, the State party's courts were correct in dismissing the authors' appeals against the C.R.N.'s refusal to register the association.

The authors' comments on the State party's observations and subsequent submissions

5.1 In their comments on the State party's observations dated 31 May 2004 the authors reiterate that the State party, by denying their association's registration on unjustified and unlawful grounds, significantly restricted their right to practice their religion and profess their opinions, together with others, including with others coming from abroad. They add that, following the amendments to the Statute in 2002, it will not be possible for them to register their association, as they have only seven communities in Belarus, none of which has been active for more than 20 years. They submit that such requirements discriminate against those religions which had no opportunity to be active during the Soviet era.

5.2 The authors contend that the State party's references to the safety concerns about the premises in question are inaccurate, as the authorities had previously conducted an inspection of the fire safety at the premises and approved its use as a legal address, subject to seven remedial measures, all of which the authors fulfilled.

5.3 It is submitted that the State party's reference to the open fire used during a marriage ceremony at the premises points to the discriminatory character of the refusal to register their association, as other religions practice similar forms of devotion without any adverse comment from the authorities. Finally, the authors state that the purpose of having a legal address is not necessarily to conduct religious ceremonies and rituals on the site, but to have a centre for the organization of their activities. Accordingly, there is no need for the special safety measures referred to by the State party.

5.4 In a further submission dated 26 November 2004, the State party reiterates that the provisions of the 2002 Statute on "Freedom of Conscience and Religious Organisations" are not discriminatory in nature, and refers to national laws of other states which require a minimal number of constituent bodies and a certain period of prior existence as a prerequisite for registration of a religious community.

5.5 The State party notes that numerous violations of health and fire regulations were recorded at the Minsk Vaishnava community's premises. A wedding ceremony had been held there on 25 May 2002, which was subsequently evaluated by the administration of the Central Minsk District as an "event which created a threat to the life and health of the participants and neighbours". On this basis, the C.R.N. refused to register the statute of the association. On 18 October 2002, the Central District Court of Minsk rejected the authors' appeal against the C.R.N.'s decision on the same grounds; this decision was in turn affirmed on appeal.

5.6 The State party explains that the registration of the association was impossible at this particular address, because it would have resulted in an increase in the frequency and attendance of religious events at the premises, which in turn would have increased health hazards. The founders of the association were requested to remedy the health and safety violations, and were invited to study the possibility of moving their proposed statutory address to another location.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee considers that the author has sufficiently substantiated his claims under articles 18, paragraphs 1 and 3, and article 22, paragraphs 1 and 2, for purposes of admissibility. It concludes that the communication is admissible and proceeds to an examination on the merits.

7.1 The Human Rights Committee has considered the present communication on the merits in the light of all the information made available to it by the parties, as provided under article 5, paragraph 1, of the Optional Protocol.

7.2 In relation to the authors' claim under article 18, paragraphs 1 and 3, the Committee recalls its general comment No. 22, which states that article 18 does not permit any limitation whatsoever on freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one's choice.[1] By contrast, the right to freedom to manifest one's religion or beliefs may be subject to certain limitations, but only those prescribed by law and necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others. Further, the right to freedom to manifest one's beliefs in worship, observance, practice and teaching encompasses a broad range of acts, including those integral to the conduct by the religious group of its basic affairs, such as the freedom to choose religious leaders, priests, and teachers, and the freedom to establish seminaries or religious schools.[2] In the present case, the Committee notes that the State party's law distinguishes between religious communities and religious associations, and that the possibility of conducting certain activities is restricted to the latter. Not having been granted the status of a religious association, the authors and their fellow believers cannot invite foreign clerics to visit the country, or establish monasteries or educational institutions. Consistent with its general comment, the Committee considers that these activities form part of the authors' right to manifest their beliefs.

7.3 The Committee must now address the question of whether the relevant limitations on the authors' right to manifest their religion are "necessary to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others", within the meaning of article 18, paragraph 3, of the Covenant. The Committee recalls its general comment No. 22, which states that paragraph 3 of article 18 is to be interpreted strictly, and that limitations may only be applied for those purposes for which they are prescribed and must be directly related to and proportionate to the specific need on which they are predicated.[3]

7.4 In the present case, the limitations placed on the authors' right to manifest their belief consist of several conditions which attach to the registration of a religious association. One of the criteria which the authors' application for registration did not meet was the requirement to have an approved legal address, which satisfied certain health and fire safety standards necessary for premises used for purposes such as religious ceremonies. These limitations must be assessed in the light of the consequences which arise for the authors and their religious association.

7.5 The Committee considers that the precondition, whereby a religious association's right to carry out its religious activities is predicated on it having the use of premises which satisfy relevant public health and safety standards, is a limitation which is necessary for public safety, and proportionate to this need.

7.6 The Committee notes, however, that the State party has not advanced any argument as to why it is necessary for the purposes of article 18, paragraph 3, for a religious association, in order to be registered, to have an approved legal address which not only meets the standards required for the administrative seat of the association but also those necessary for premises used for purposes of religious ceremonies, rituals, and other group undertakings. Appropriate premises for such use could be obtained subsequent to registration. The Committee also notes that the argument of the State party in its comments on the communication that the authors' community sought to monopolize representation of Vishnuism in Belarus did not form part of the domestic proceedings. Also taking into account the consequences of refusal of registration, namely the impossibility of carrying out such activities as establishing educational institutions and inviting foreign religious dignitaries to visit the country, the Committee concludes that the refusal to register amounts to a limitation of the authors' right to manifest their religion under article 18, paragraph 1 that is disproportionate and so does not meet the requirements of article 18, paragraph 3. The authors' rights under article 18, paragraph 1 have therefore been violated.

7.7 In light of the above, the Committee does not consider it necessary to consider the authors' claims of a violation of their rights under article 22 of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose violations of article 18, paragraphs 1 and 3, of the Covenant.

9. Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee considers that the authors are entitled to an appropriate remedy, including a reconsideration of the authors' application in accordance with the principles, rules and practice in force at the time of the authors' request, and duly taking into account of the provisions of the Covenant.

10. By becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not, and pursuant to article 2 of the Covenant, the State party has undertaken to ensure all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant, and to provide an effective and enforceable remedy in cases where a violation has been established. The Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] General comment 22, para. 3.

[2] General comment 22, para. 4.

[3] General comment 22, para. 8.

APPENDIX

Individual opinion of Committee member Ms. Ruth Wedgwood (concurring)

The right of a religious community to establish monasteries, educational institutions, or missions, and to invite foreign religious figures to speak, has been sharply restricted by the government of Belarus. Only those groups officially registered with the state as "religious associations" can enjoy these aspects of the free practice of religion.

The seven "Krishna" religious communities of Belarus have attempted to gain the state's approval as a registered association, applying to the "Committee on Religions and Nationalities." The state committee denied the application, after a year's delay, on the ground that the Krishna group lacked a proper "legal address." The address used by the applicants was located in a residential housing bloc. The same address had earlier been approved by the Minsk City Executive Committee.

The refusal to register the Krishna group as a religious "association" was appealed to the Minsk Central District Court in 2002. One month after the first-level dismissal of the appeal, the state amended the applicable law to add further new restrictions on the registration of religious associations.

Under the additional test, a religious group seeking qualification as an "association" must show that it has been active in Belarus for at least 20 years, and that it has at least 10 "communities" within the country. The Krishna does not have the minimum number of communities, and cannot point to a 20-year history within Belarus.

The Human Rights Committee now properly finds that the state party violated article 18 of the Covenant by refusing to accept the legal address of the Krishna community as an "administrative seat" for a religious association. I join my colleagues in their conclusion that the state has a valid interest in assuring safe conditions for large public gatherings, but that such gatherings can also be held in other locations. The refusal to register the Krishna group because of its residential address was thus unreasonable.

However, the state party's new "grandfathering" rule is also highly problematic - as an added obstacle to free religious practice in Belarus. It is hard to imagine why a newer faith should be forbidden to engage in religious education, and thus the demand for 20 years of prior practice is doubtful. It is difficult to fathom why 10 "communities" could be a prerequisite to educational activity, especially since one "community," such as that in Minsk, may be larger than many small separate communities.

Having found a violation of article 18, the Committee does not have occasion to reach these further issues. But it is well to remember that the Covenant recognizes and guarantees the freedom of every person "either individually or in community with others and in public or private to manifest his religion or belief in worship, observance, practice and teaching." See article 18 (1). This right is not limited to old and established religions, or to large congregations, and it is fundamental to the freedom of religious conscience.

(*Signed*): Ms. Ruth Wedgwood

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

AA. Communication No. 1222/2003, *Byahuranga v. Denmark* (Views adopted on 1 November 2004, eighty-second session)*

Submitted by:	Jonny Rubin Byahuranga (represented by counsel, Mr. Tyge Trier)
Alleged victim:	The author
State party:	Denmark
Date of communication:	15 August 2003 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 1 November 2004,

Having concluded its consideration of communication No. 1222/2003, submitted to the Human Rights Committee on behalf of Jonny Rubin Byahuranga under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Jonny Rubin Byahuranga, a Ugandan national born on 28 October 1956, currently residing in Denmark and awaiting expulsion to Uganda. He claims to be victim of a violation by Denmark[1] of articles 7, 17 and 23, paragraph 1, of the Covenant. He is represented by counsel.

1.2 On 27 November 2003, the communication was transmitted to the State party. On 7 July 2004, the author requested the Committee to issue a request for interim measures under rule 86 of its rules of procedure, asking the State party not to deport him while his communication was under consideration by the Committee. On 9 July 2004, the Committee, through its Special Rapporteur on new communications, requested the State party not to deport the author before the Committee has had an opportunity to address the continued need for interim measures. The State party acceded to this request. On 30 July 2004, the Committee informed the State party of its decision to extend its temporary request not to deport the author until the closing date of the Committee's eighty-second session, i.e. 5 November 2004.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

The text of an individual opinion signed by Committee members Ms. Ruth Wedgwood and Mr. Maxwell Yalden is appended to the present document.

Facts as submitted by the author

2.1 The author served as an officer in the Ugandan army during the rule of Idi Amin. He fled Uganda in 1981, after he had been unlawfully detained and allegedly tortured several times by military forces. In December 1984, he entered Denmark, where he was granted asylum on 4 September 1986, under section 7 (1) (ii)[2] of the Aliens Act. On 24 July 1990, he was issued a permanent residence permit.

2.2 In 1997, the author married a Tanzanian national. Together with the author's daughter from a former marriage (born in 1980), his wife united with him in Denmark in 1998. She has meanwhile become a Danish citizen and has two children with the author, who were born in Denmark in 1999 and 2000, respectively.

2.3 By judgement of 23 April 2002, the Copenhagen City Court convicted the author of drug-related offences (section 191 of the Danish Criminal Code), and sentenced him to two years and six months' imprisonment. It also ordered the author's expulsion from Denmark,[3] finding that such expulsion would not amount to a violation of the right to family life under article 8 of the European Convention, and permanently barred him from re-entering Denmark. It based its decision on an opinion dated 19 April 2002 of the Danish Immigration Service, which considered that there were no circumstances which would constitute a decisive argument against the author's expulsion within the meaning of section 26[4] of the Aliens Act. It based itself on (a) the fact that, at the age of 45 years, the author had resided in Denmark for 17 years and four months; (b) the author's good health, i.e. the absence of any diseases which could not be treated in Uganda; (c) the fact that his expulsion would not affect the right of his spouse and children to continue residing in Denmark, given that his wife and his older daughter had meanwhile been granted permanent residence permits; (d) the absence of any risk that, in cases other than those mentioned in section 7 (1) and (2) of the Aliens Act, he would be ill-treated in Uganda. The Immigration Service did not object to the prosecutor's claim to expel the author, despite the latter's loose ties with his Ugandan family and the fact that he had not returned to Uganda since 1981.

2.4 On 3 September 2002, the High Court of Eastern Denmark dismissed the author's appeal against the decision of the Copenhagen City Court. On 12 November 2002, the Danish Board of Appeal rejected the author's application for leave to appeal against the High Court's judgement.

The complaint

3.1 The author claims (a) that his expulsion would amount to a violation of his rights under article 7 of the Covenant, as it would expose him to a real and immediate danger of being subjected to ill-treatment upon return to Uganda; and (b) that it would constitute an arbitrary interference with his right to family life under article 17 of the Covenant and a violation of the State party's duty to respect and protect the family as the natural and fundamental group unit of society, as prescribed by article 23, paragraph 1.

3.2 The author emphasizes that he has lived in Denmark for 18 years without ever having returned to Uganda, that he has no contact with relatives in Uganda, that his wife and children are living with him; the two youngest children were born in Denmark and have never been to Uganda.

State party's observations on admissibility and merits

4.1 On 11 February 2004, the State party submitted its observations on the admissibility and merits of the communication, challenging the admissibility because of the author's failure to exhaust domestic remedies, and denying violations of articles 7, 17 and 23, paragraph 1.

4.2 Regarding exhaustion of domestic remedies, the State party submits that, on 31 July 2003, the author requested the Copenhagen police to place the matter of revocation of the expulsion order before a tribunal, for review under section 50 (1)[5] of the Aliens Act. On 29 August 2003, the police requested the Danish Immigration Service to provide another opinion on the desirability of the author's expulsion. On 18 September 2003, the Immigration Service reiterated that it was not in possession of any information as to whether the author would be exposed to particularly burdensome criminal sanctions upon return to Uganda, or whether he would be at risk of double jeopardy for the same offence for which he had been convicted in Denmark. However, it had requested the Danish Foreign Ministry to investigate the risk of double jeopardy in Uganda. Apart from such risk, possible grounds for asylum set out in section 7 (1) and (2) of the Aliens Act could not be taken into account, in accordance with section 26 (1) (vii) of the Act. The Immigration Service concluded that, in the light of the nature of the offences committed by, and the severity of the prison sentence imposed on, the author, his personal circumstances did not outweigh the arguments for his expulsion.

4.3 The State party adds that, on 11 November 2003, the Copenhagen City Court affirmed the expulsion order against the author, finding that its revocation was not required under article 3 of the European Convention on Human Rights, since the author still could invoke section 31[6] of the Aliens Act, allowing for a further risk assessment[7] by the Danish Immigration Service prior to his return to Uganda. On 1 December 20003, the High Court of Eastern Denmark dismissed the author's appeal against the City Court's decision. On 19 January 2004, the Danish Immigration Service, based on information from the Foreign Ministry about an amnesty for supporters of former President Amin and the risk of double jeopardy in Uganda, determined that section 31 of the Aliens Act would not preclude the author's expulsion. The author's appeal to the Danish Refugee Board and his application to the Board of Appeal for leave to appeal the High Court's decision of 1 December 2003, were still pending when the State party made its submission. It is thus submitted that the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

4.4 On the merits, the State party submits that the procedure before the Danish courts and immigration authorities ensures that a person will not be expelled to a country where he or she would face a real risk of being subjected to torture or to cruel, inhuman or degrading treatment or punishment. The Danish Immigration Service, both in its opinions dated 19 April 2002 and 18 September 2003, and in its risk assessment under section 31 of the Aliens Act, carefully examined the author's risk of being subjected to ill-treatment. It concluded that his expulsion would not contravene sections 26 or 31 of the Aliens Act. The latter reflects Denmark's obligations under article 3 of the European Convention on Human Rights and hence article 7 of the Covenant. The State party concludes that the author's expulsion would be compatible with article 7 of the Covenant.

4.5 While conceding that the author's expulsion constitutes an interference with his right to family life under article 17, the State party argues that this interference is provided for by law, is in accordance with the provisions, aims and objectives of the Covenant, and reasonable in the circumstances of the case, given that it was based on the author's conviction for a particularly serious offence. The State party invokes its right to control the entry and residence of aliens, which included a right to expel persons convicted of criminal offences, insofar as such expulsion was not arbitrary but proportionate to the legitimate aim pursued. For the State party, the author's expulsion would not constitute an unreasonable hardship for his wife and oldest daughter, who both only had minor ties with Denmark and could therefore reasonably be expected to accompany the author. Conversely, if they prefer to stay in Denmark, their right of residence would not be affected by the author's expulsion, as they were both issued permanent residence permits.

4.6 The State party argues that, while constituting an interference with article 23, paragraph 1, of the Covenant, the author's expulsion would not violate that provision, since nothing prevented his wife, a Tanzanian national, their children, or his oldest daughter from continuing their family life with the author in Tanzania or elsewhere outside Denmark.

5. On 17 March 2004, the State party informed the Committee that, by decision of 17 February 2004, the Board of Appeal dismissed the author's application for leave to appeal against the High Court's decision of 1 December 2003.

Author's request for interim measures

6.1 On 7 and 9 July 2004, the author requested the Committee to seek the State party's assurance that he will not be expelled to Uganda while his communication is under consideration by the Committee, where he would risk suffering irreparable harm, due to his former position as lieutenant during the rule of Idi Amin.

6.2 The author submits that, by decision of 28 June 2004, the Danish Refugee Board dismissed his appeal against the decision of the Danish Immigration Service dated 19 January 2004, on the ground that he would risk no harm upon return to Uganda. On 6 July 2004, the police formally notified him of this decision, and informing him that he would be deported without delay.

6.3 The author argues that he was an outspoken critic of the present Ugandan government during his time in Denmark and that he participated in conferences, where he protested against Uganda's treatment of political opponents. He identifies several current Ugandan military and government officials whom he fears particularly.

6.4 In support of his claim, the author refers to reports from non-governmental and governmental sources, which confirm the continued occurrence of extrajudicial killings, torture and arbitrary detention of political opponents or suspected rebel supporters in Uganda. By reference to the Committee's jurisprudence, he argues that his immediate expulsion from Denmark would render examination of his communication by the Committee moot.

State party's additional submission and author's comments

7. On 15 July 2004, the State party conceded that the author has exhausted domestic remedies, after his appeal against the decision of 19 January 2004 of the Danish Immigration Service was dismissed by the Immigration Board on 28 June 2004. A subsequent request to the Minister for Refugees, Immigration and Integration to grant him a residence permit on humanitarian grounds, pursuant to section 9b (1) of the Aliens Act, was rejected on 9 July 2004, as such a permit could, at the earliest, be granted two years after an applicant's departure from Danish territory.

8. On 21 July 2004, the author observed that the State party had not addressed the risk of irreparable harm that he would face upon return to Uganda. In support of his claims, he submits a letter dated 14 July 2004 from the former chairman of the Schiller Institute in Denmark, who confirms that the author participated in conferences of the Institute in his capacity as chairman of the Ugandan Union in Denmark. His participation in a September 1997 conference, during which Ugandan President Museveni's alleged links with the Rwandan Patriotic Front were criticized, was documented in an article published in the Executive Intelligence Review on 10 October 1997, as well as in a German-language newspaper. The letter expresses concern that the Ugandan Embassy in Copenhagen may have registered Ugandan citizens who participated in the Schiller Institute's conferences.

Author's comments on the State party's observations on admissibility and merits

9.1 On 26 August 2004, the author commented on the State party's admissibility and merits submissions of 11 February and 15 July 2004, reiterating that he has exhausted domestic remedies. He submits that the letter from the Schiller Institute clearly shows that the Ugandan authorities are aware of his political activities, on the basis of the lists of participants of the conferences he attended, which are also available online. While claiming that the danger he faces upon return to Uganda is real and a necessary and foreseeable consequence of deportation, the author criticizes that the State party failed to address the evidence he had submitted.

9.2 By merely relying on the risk assessments conducted by the Danish Immigration Service on 19 April 2002 and 18 September 2003, under sections 50 and 26 of the Aliens Act, the State party ignored the fact that a substantial part of the author's article 7 complaint was based on information obtained after the risk assessments. In the absence of a response from the State party to his specific submissions, considerable weight should be given to these uncontested submissions, given that the State party had the opportunity to investigate his allegations thoroughly. It had not shown that the circumstances in Uganda had changed fundamentally, so as to render the reasons for granting him asylum, in 1986, obsolete.

9.3 In support of his claims under articles 17 and 23, the author reiterates that he and his wife have two children who were both born and raised in Denmark, speak Danish and consider Denmark as their home. The State party's failure to address this aspect could not change the importance which the Committee should accord to their upbringing in a stable and reliable environment, especially if articles 17 and 23 of the Covenant are interpreted in the light of articles 9 and 16 of the Convention on the Rights of the Child. His important role in the lives of the two children is reflected in several reports on family visits during prison leave; the reports record the happiness of the children to see their father.

9.4 On 6 August 2004, the Copenhagen City Court decided to release the author, thereby implicitly acknowledging his close family ties, as well as the hardship that the 11 months in custody on remand pending deportation after the end of his prison sentence constituted for him and his family. He argues that enabling him to resume his family life for a few months, during which he may look after his children while his wife works, only to eventually deport him to Uganda, would amount to a severe infringement of his rights under articles 17 and 23.

9.5 Regarding the State party's argument that nothing prevents his family from continuing to live together outside Denmark, the author submits that his wife would not be able to follow him to a country without any job opportunities or any prospects for schooling and day-care institutions for her children.

9.6 The author adds that the possibility of his resettling in Tanzania, as proposed by the State party, is not a realistic option, since that country is under no obligation to receive him, and most likely reluctant to accept a non-national who had been convicted of a criminal offence. Despite occasional visits to Tanzania, he has no ties to that country.

9.7 The author reiterates that he has no contact with any family members in Uganda. His tribe members, the Toros, were likely to treat him as an outcast or to kill him, because of his service in the army of Idi Amin, who had oppressed the Toros.

9.8 The author recalls that the May 2002 judgement of the Copenhagen City Court was not unanimous with regard to his expulsion, as one of the three judges considered his expulsion incompatible with article 8 of the European Convention on Human Rights. In a case similar to this, involving the deportation of a foreign national who had lived in Denmark for a number of years together with his wife, and who also had been ordered deported on the basis of a conviction for drug related offences, the European Court of Human Rights had found a violation of article 8 of the Convention.[8]

9.9 The author argues that, in the light of the length of his stay in Denmark and his family's interest to continue living together, the State party's decision to deport him must be considered disproportionate to the aim pursued, despite the relatively serious nature of his conviction. By reference to the Committee's jurisprudence,[9] he concludes that the expulsion order against him constitutes arbitrary interference with his rights under article 17 and 23.

Issues and proceedings before the Committee

Consideration of admissibility

10.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

10.2 The Committee has ascertained, in accordance with article 5, paragraphs (a) and (b), of the Optional Protocol, that the same matter is not being examined under another international procedure of investigation or settlement, and that the author has exhausted domestic remedies, as conceded by the State party.

10.3 The Committee considers that the author has sufficiently substantiated his claims under articles 7, 17 and 23, paragraph 1, for purposes of admissibility. It concludes that the communication is admissible and proceeds to an examination on the merits.

Consideration of the merits

11.1 The Human Rights Committee has considered the present communication in light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

11.2 The first issue before the Committee is whether the author's expulsion to Uganda would expose him to a real and foreseeable risk of being subjected to treatment contrary to article 7. The Committee recalls that, under article 7 of the Covenant, States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.[10] It takes note of the author's detailed account as to why he fears to be subjected to ill-treatment at the hands of the Ugandan authorities, and concludes that he has made out a prima facie case of such a risk.

11.3 The Committee observes that the State party, while challenging the author's claim under article 7, does not submit any substantive grounds for its position. Instead, it merely refers to the risk assessments of the Danish Immigration Service under articles 26 (opinions dated 19 April 2002 and 18 September 2003) and 31 (decision of 19 January 2004, as affirmed by the Danish Refugee Board on 28 June 2004) of the Aliens Act. After an examination of the documents, the Committee notes, firstly, that the Immigration Service's scrutiny under article 26 (1) (vii) of the Aliens Act was limited to an assessment of the author's personal circumstances in Denmark, as well as his risk of being subjected to punishment for the same offence for which he had been convicted in Denmark, without addressing the broader issues under article 7 of the Covenant, such as ill-treatment which may give rise to an asylum claim under article 7 (1) and (2) of the Aliens Act. Secondly, in its decision of 19 January 2004, the Immigration Service merely relies on an assessment made by the Ministry for Foreign Affairs concerning the risk of double jeopardy in Uganda and an amnesty for supporters of former President Amin to conclude that the author would not face a risk of being tortured or ill-treated upon return to Uganda. Similarly, the Refugee Board, after giving a detailed account of the author's statements as to his fear of being subjected to ill-treatment upon return to Uganda, dismissed his appeal on the basis of the same opinion by the Ministry, without providing any substantive reasons of its own, in its decision of 28 June 2004. In particular, the Board merely dismissed, because of late submission, the author's claim that his political activities in Denmark were known to the Ugandan authorities, thereby placing him at a particular risk of being subjected to ill-treatment upon return to Uganda. The State party has not furnished the Committee with the opinion of its Ministry for Foreign Affairs or with other documents that would make out the factual basis for the Ministry's assessment. In sum, before the Committee the State party seeks to refute the alleged risk of treatment contrary to article 7 merely by referring to the outcome of the assessment made by its own authorities, instead of commenting the author's fairly detailed account on why such a risk in his opinion exists.

11.4 In the light of the State party's failure to provide substantive arguments upon which the State party relies to rebut the author's allegations, the Committee finds that due weight must be given to his detailed account of the existence of a risk of treatment contrary to article 7. Consequently, the Committee is of the view that the expulsion order against the author would, if implemented by returning him to Uganda, constitute a violation of article 7 of the Covenant.

11.5 As to the alleged violation of the author's right to family life under articles 17 and 23, paragraph 1, the Committee reiterates its jurisprudence that there may be cases in which a State party's refusal to allow one member of a family to remain in its territory would involve interference in that person's family life. However, the mere fact that one member of the family is entitled to remain in the territory of a State party does not necessarily mean that requiring other members of the family to leave involves such interference.[11]

11.6 In the present case, and as the State party has conceded that the author's removal would constitute an interference with his family life, the Committee considers that a decision by the State party to deport the father of a family with two minor children and to compel the family to choose whether they should accompany him or stay in the State party is to be considered "interference" with the family. Although the author's life with his family was interrupted for a considerable period of time because of his incarceration and subsequent custody on remand pending deportation, he received regular visits from his wife during that period and was able to visit his children several times during prison leave. Moreover, he resumed his family life after the Copenhagen City Court's decision to release him on 6 August 2004.

11.7 The issue therefore arises whether or not such interference would be arbitrary or unlawful and thus contrary to article 17, read in conjunction with article 23, paragraph 1, of the Covenant. The Committee observes that the author's expulsion was based on section 22 of the Aliens Act. However, it recalls that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be reasonable in the particular circumstances.[12] In this regard, the Committee reiterates that in cases where one part of a family must leave the territory of the State party while the other part would be entitled to remain, the relevant criteria for assessing whether or not the specific interference with family life can be objectively justified must be considered, on the one hand, in light of the significance of the State party's reasons for the removal of the person concerned and, on the other, the degree of hardship the family and its members would encounter as a consequence of such removal.[13]

11.8 The Committee notes that the State party justifies the author's removal (a) by the fact that he was convicted of drug-related offences, and (b) on the assumption that the serious nature of these offences is reflected by the length of the prison sentence imposed on him. It also takes note of the author's argument that his wife and children live in Denmark under stable and reliable conditions and would, therefore, not be able to follow him, if he were to be expelled to Uganda. While it may well be that the author's expulsion would constitute a considerable hardship for his wife and children, whether they remain in Denmark, or whether they decide to avoid separation of the family by following the author to a country they do not know and whose language the children do not speak, the Committee notes that the author has submitted the communication solely in his own right and not on behalf of his wife or children. It follows that the Committee can only consider whether the author's rights under articles 17 and 23 would be violated as a result of his removal.

11.9 In the present case, the Committee notes that the State party has sought to justify its interference with the author's family life by reference to the nature and severity of the author's offences. The Committee considers that these reasons advanced by the State party are reasonable and sufficient to justify the interference with the author's family life. The Committee therefore concludes that the author's expulsion, if implemented by returning him to Uganda, would not amount to a violation of his rights under articles 17 and 23, paragraph 1.

12. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the author's expulsion to Uganda would, if implemented, violate his rights under article 7 of the Covenant.

13. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including revocation and full re-examination of the expulsion order against him. The State party is also under an obligation to prevent similar violations in the future.

14. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] The Covenant and the Optional Protocol entered into force for the State party on 23 March 1976.

[2] Section 7 (1) of the Aliens Act then in force read: "Section 7. (1) Upon application, a residence permit shall be issued to an alien in Denmark or at the border, (i) if the alien falls within the provisions of the Convention on the Status of Refugees of 28 July 1951; or (ii) if for reasons similar to those listed in the Convention or for other weighty reasons, the alien cannot be required to return to his country of origin."

[3] Section 22 of the Aliens Act then in force read, in pertinent parts: "Section 22. An alien who has lawfully stayed in Denmark for more than the past seven years or an alien issued with a residence permit under sections 7 or 8 may be expelled if: […] (iv) the alien is sentenced, pursuant to the Drugs and Narcotics Act or pursuant to sections 191 or 191a of the Criminal Code, to imprisonment […]."

[4] Section 26 of the Aliens Act then in force read: "Section 26. (1) In deciding on expulsion, regard must be had to the question whether the expulsion must be presumed to be particularly burdensome, in particular because of:

(i) the alien's ties with the Danish community [...];

(ii) the duration of the alien's stay in Denmark;

(iii) the alien's age, health and other personal circumstances;

(iv) the alien's ties with persons living in Denmark;

(v) the consequences of the expulsion for the alien's close relatives living in Denmark;

(vi) the alien's weak or non-existing ties with his country of origin or any other country in which he may be expected to take up residence; and

(vii) the risk that, in cases other than those mentioned in section 7 (1) and (2), the alien will be ill-treated in his country of origin or any other country in which he may be expected to take up residence.

(2) An alien may be expelled under section 22 (iv) to (vi) unless the circumstances mentioned in subsection (1) constitute a decisive argument against such expulsion."

[5] Section 50 (1) of the Aliens Act reads: "(1) If expulsion under section 49 (1) has not been enforced, an alien claiming that a material change in his circumstances has occurred, cf. section 26, can request that the public prosecutor put the question of resumption [revocation] of the expulsion order before court. A request to that effect must be submitted not earlier than 6 months and not later than 2 months before the date when enforcement of the expulsion can be expected. If the request is submitted at a later date, the court may decide to examine the case if it deems it to be excusable that the time limit has been exceeded."

[6] Section 31 of the Aliens Act reads: "(1) An alien may not be returned to a country where he will be at risk of the death penalty or of being subjected to torture or inhuman or degrading treatment or punishment, or where the alien will not be protected against being sent on to such country. (2) An alien falling under section 7 (1) may not be returned to a country where he will risk persecution on the grounds set out in article 1 A of the Convention on the Status of Refugees (28 July 1951), or where the alien will not be protected against being sent on to such country. This does not apply if the alien must reasonably be deemed a danger to national security or if, after final judgement in respect of a particularly dangerous crime, the alien must be deemed a danger to society, but cf. subsection (1)."

[7] See section 49a of the Aliens Act: "Section 49a. Prior to the return of an alien who has been issued a residence permit under sections 7 or 8 and who has been expelled by judgement [...], the Danish Immigration Service decides whether the alien can be returned, cf. section 31, unless the alien consents to his return. [...]."

[8] European Court of Human Rights, application No. 56811/00 (*Amrollahi v. Denmark*), Judgement of 11 July 2002.

[9] See communication No. 1069/2002, *Bakhkiyari v. Australia*, Views adopted on 29 October 2003, at para. 9.6.

[10] General comment 20 [44], at para. 9.

[11] Communication No. 930/2000, *Winata v. Australia*, Views adopted on 26 July 2001, at para. 7.1; communication No. 1011/2001, *Madafferi v. Australia*, Views adopted on 26 July 2004, at para. 9.7.

[12] General comment 16 [32], at para. 4.

[13] See communication No. 1011/2001, *Madafferi v. Australia*, Views adopted on 26 July 2004, at para. 9.8.

Individual opinion of Committee members Ms. Ruth Wedgwood and Mr. Maxwell Yalden (dissenting)

The majority concludes that Denmark has failed adequately to support its decision to deport the author, a Ugandan citizen, following his conviction for drug-related criminal offences and a prison sentence of two years, six months. The majority finds that the author, who was a former member of Idi Amin's armed forces, has shown a "prima facie" case that he would risk torture or other mistreatment in Uganda upon his return, and that the State party has not rebutted it.

States parties have a duty to observe the international legal requirements of non-refoulement. The general circumstances in Uganda are not reassuring. In the Human Rights Committee's recent review of Uganda's country report under the Covenant, for example, the Committee noted a "widespread practice of torture and ill-treatment" of persons in detention. (concluding observations on Uganda, 5 May 2004, at para. 17). The State party would therefore wish to give careful consideration to the dangers claimed by the author.

Nevertheless, the Committee cannot sit in review of the facts and evidence *de novo* in each deportation case, especially where a case turns upon an evaluation of a complainant's credibility. The Committee has therefore been obliged to examine the documents available to it. The State party's response in this case describes the lengthy review of the author's status by the national authorities. This has included information obtained from the Foreign Ministry, and three reviews by the Danish Immigration Service, as well as decisions of the Copenhagen City Court, the High Court of Eastern Denmark, and the Danish Board of Appeal. The 28 June 2004 decision of the Danish Refugee Board was also submitted to the Committee by the author's counsel, though counsel chose not to provide a translation, leaving it available only to those few members of the Committee who might be able to read Danish.

The State party has assured the Committee that it is "at the disposal of the Secretary-General of the United Nations should this pleading or the case in general give rise to any questions". (State party's observations of 11 February 2004 on admissibility and merits, at p. 1.) The Committee is able to pose written requests to States parties, as well as to complainants. If the Committee had wished to have the author's full immigration file or any other documents within it, it could easily have asked the State party. Denmark has been wholly cooperative with the Committee while this complaint was pending, holding in abeyance the author's deportation at the Committee's request, and releasing him on parole to his family. The Committee has not ordinarily asked to see a foreign ministry's telex traffic, when presented with reasoned opinions, and it is doubtful that many States would agree to provide confidential material of this nature. But the Committee is certainly able to ask for the documents that it finds necessary for an evaluation, instead of deciding a case irrevocably on an incomplete record.

At a minimum, the Committee should have given the State party an opportunity to provide any additional documents it wished to inspect. And we believe that this requirement has not been met. It is true that, in the absence of any cooperation and provision of information by a State party, the Committee may, as appropriate, decide to give "due weight" to an author's allegations, and may proceed to find a violation on that basis. However, this conclusion is not warranted in the present case, where the State party, as noted above, made an effort to cooperate with the Committee, and could readily have been asked to provide further relevant information.

The Committee has a clear duty to respect a standard of fairness that entails not only being fair to both parties but being seen to be fair, and we believe that standard has not been respected. We therefore cannot agree that the conclusion of a violation of the Covenant can be sustained in the present case.

(*Signed*): Ruth Wedgwood

(*Signed*): Maxwell Yalden

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Annex VI

DECISIONS OF THE HUMAN RIGHTS COMMITTEE DECLARING COMMUNICATIONS INADMISSIBLE UNDER THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

A. Communication No. 851/1999, *Zhurin v. The Russian Federation* (Decision adopted on 2 November 2004, eighty-second session)*

Submitted by:	Mr. Vladimir S. Zhurin (not represented by counsel)
Alleged victim:	Mr. Vladimir V. Zhurin (the author's son)
State party:	Russian Federation
Date of communication:	15 December 1998 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 2 November 2004,

Adopts the following:

Decision on admissibility

1.1 The author of the communication is Vladimir S. Zhurin, a Russian national, on behalf of his son Vladimir V. Zhurin, also a Russian born in 1966, who at the time of submission of the communication, was under sentence of death following a judgement given in 1990 by the Supreme Court of Bashkir Autonomous Soviet Republic (today the Republic of Bashkortostan, Russian Federation). He claims that his son is a victim of violations by the Russian Federation[1] of his rights under articles 6, 7, 10, and 14, paragraphs 1, 2, and 3, (b), (d), (e), and (g), of the Covenant. The author is not represented by counsel.

1.2 On 10 February 1999, the Human Rights Committee, acting through its Special Rapporteur on new communications and interim measures, requested the State party under rule 86 of the Committee's rules of procedure not to carry out the death sentence against

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Mr. Zhurin while his case was under consideration by the Committee. From a subsequent submission of the author, dated 10 March 1999, it transpired that Mr. Zhurin's death sentence was commuted to life imprisonment by Presidential Decree of 23 September 1993.

The facts as submitted by the author

2. The author notes that his son was sentenced to death on 12 January 1990 for premeditated murder involving the use of violence, a premeditated murder in order to hide another crime, and for robbery involving the use of violence. The Supreme Court of the Russian Socialist Federative Soviet Republic (RSFSR) upheld the sentence on 11 May 1990. He was found guilty, with four other persons (including his brother E. Zhurin) of having committed different crimes including murders in Russia and the then Uzbek Soviet Socialist Republic between 1984 and 1988.

The claim

3.1 The author contends that during the investigation, his son was handcuffed to his chair and beaten to make him confess his guilt. For three months after his arrest on 3 May 1988, he was unable to meet with his family. Only in July 1988, after numerous interventions with the authorities by the family, his son was "shown" to the family; according to the author, his son's face was swollen and bruised, and he was depressed. Article 7 of the Covenant is said to have been violated by reason of the treatment Mr. Zhurin was subjected to.

3.2 Article 10 of the Covenant is said to have been violated during the investigation, as Mr. Zhurin was beaten and deprived of food, thus violating his human dignity; he was detained together with "criminal recidivists" who threatened him with physical violence; and the investigators threatened to hang him in his cell and to disguise his death as a suicide.

3.3 According to the author, his son's guilt was not proven by the prosecution and the tribunal, in violation of the right to a fair trial under article 14, paragraphs 1 and 2, and the sentence was devoid of any legal basis. According to him, his son's conviction was based on the testimonies of persons who had a particular interest in the outcome of the case: his son's co-accused Mr. Kitsaev (who allegedly received a lighter sentence) and Mr. Kayumov (who allegedly was obliged to testify under duress during the investigation, and who retracted his testimony later in court).

3.4 Mr. Zhurin's rights under article 14, paragraph 3 (b), are said to have been violated as his lawyer was allowed to see him only once the indictment had been prepared by the investigation, i.e. when the case had already been "fabricated". The author claims that on 24 May 1988, he requested the Prosecutor of Chelyabinsk to allow him to retain a private lawyer for his son, but he was not allowed to do so. Subsequent meetings with his lawyer allegedly took place in the presence of an investigator, and the lawyer and the author's son did not have sufficient time to acquaint themselves with the charges. Mr. Zhurin allegedly prepared the cassation appeal himself, as his lawyer was unwell, and there was neither any time nor any possibility to hire another lawyer.

3.5 Article 14, paragraph 3 (d), of the Covenant, is said to have been violated, as Mr. Zhurin was not represented by a lawyer from the beginning of his detention and the author's requests to this effect were denied. The author claims that not a single request made by the defence and by his son were considered or granted by the court. According to him, his son should have been tried by a jury, not a single judge.

3.6 The author claims that his son's rights under article 14, paragraph 3 (e), of the Covenant were violated, because the court denied his requests to cross-examine different witnesses and to ask for the appearance of additional expert witnesses.

3.7 According to the author, article 14, paragraph 3 (g) was violated in the case of his son, as he was forced by the investigators to confess his guilt on every charge.

3.8 Finally, the author claims that article 6 was violated with respect to his son, because he was illegally sentenced to death after a procedurally flawed trial, for murders that he did not commit.

State party's observations on admissibility and merits

4.1 On 26 January 2000, the State party observed that Mr. Zhurin's death sentence was upheld by the Supreme Court of the RSFSR on 11 May 1990. On 23 September 1993, he received a Presidential pardon, and the death sentence was commuted to life imprisonment.

4.2 The State party contends that Mr. Zhurin's criminal case was examined, on appeal, by the Supreme Court as well as on two occasions by the Prosecutor's Office under a supervisory procedure, and the courts' rulings in the case were found to be lawful and well-founded.

4.3 According to the State party, the circumstances of the case were examined fully, thoroughly, and objectively. There were no breaches of criminal or procedural law that would lead to an overturn of the conviction. The issue of Mr. Zhurin's mental state was also investigated thoroughly, including through an in-patient psychiatric test, which concluded that he was of sound mind. According to the State party, the evidence was properly assessed, and Mr. Zhurin's punishment was imposed in accordance with the law in force at the time the offences were committed.

Author's comments

5. On 21 July 2000, the author merely reiterated his initial claims and dismissed the State party's submission as incorrect.

Issues before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that the same matter is not being examined under any other international procedure and that domestic remedies have been exhausted. The requirements of article 5, paragraph 2 (a) and (b), of the Optional Protocol have thus been met.

6.3 As to the *ratione temporis* requirement, the Committee has noted the author's claims set out in paragraphs 3.1 to 3.8 above. It notes that the Covenant entered into force for the Russian Federation on 23 March 1976, and the Optional Protocol on 1 January 1992. In this case, the author was found guilty of murder and other crimes, and sentenced to death by decision of the Supreme Court of the Bashkir Republic on 12 January 1990. The final judicial decision in his case was handed down by the Supreme Court of the Russian Federation (RSFSR) on 11 May 1990, i.e. before the entry into force of the Optional Protocol for the State party.

6.4 The Committee recalls its jurisprudence that a State party's obligations under the Covenant apply as of the date of its entry into force for that State party.[2] The Committee has also consistently held that it cannot consider, under the Optional Protocol Procedure, alleged violations of the Covenant which occurred before the entry into force of the Optional Protocol for the State party concerned, unless the violations complained of continue after the entry into force of the Optional Protocol.[3] A continuing violation is to be interpreted as an affirmation, after the entry into force of the Optional Protocol, by act or by clear implication, of the previous violations of the State party.

6.5 In the present case, the author's claims under articles 7, 10, and 14 of the Covenant (paragraphs 3.1 to 3.8 above), all relate to events which occurred before the State party formally recognized the Committee's competence under the Optional Protocol. The Committee recalls its jurisprudence that a term of imprisonment, without the involvement of additional factors, does not amount per se to a "continuing effect", in violation of the Covenant, sufficient to bring the original circumstances giving rise to the imprisonment *ratione temporis* within the Committee's jurisdiction.[4] In the absence of any pertinent information about any possible continuing effects of the alleged violations after the entry into force of the Optional Protocol for the State party, i.e. 1 January 1992, which would in themselves constitute a violation of the Covenant, the Committee concludes that this part of the communication is inadmissible *ratione temporis*, pursuant to article 1 of the Optional Protocol.

6.6 In the circumstances, and given that the author's sentence to death was commuted in 1993, the Committee sees no need to examine the author's remaining claim under article 6.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible pursuant article 1 of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] The Covenant entered into force for the State party on 23 March 1976, the Optional Protocol on 1 January 1992 (accession). Upon acceding to the Optional Protocol, the State party made the following declaration:

> "The Union of Soviet Socialist Republics, pursuant to article 1 of the Optional Protocol, recognizes the competence of the Human Rights Committee to receive and consider communications from individuals subject to the jurisdiction of the Union of Soviet Socialist Republics, in respect of situations or events occurring after the date on which the Protocol entered into force for the USSR. The Soviet Union also proceeds from the understanding that the Committee shall not consider any communications unless it has been ascertained that the same matter is not being examined under another procedure of international investigation or settlement and that the individual in question has exhausted all available domestic remedies."

[2] See, for example communication No. 520/1992, *Könye and Könye v. Hungary*.

[3] Idem.

[4] See, for example, *Yong-Joo Kang v. The Republic of Korea*, communication No. 878/1999, and *Baulin v. The Russian Federation*, communication No. 771/1997.

B. Communication No. 860/1998, *Álvarez Fernández v. Spain* (Decision adopted on 31 March 2005, eighty-third session)*

Submitted by:	Aurelio Fernández Álvarez (not represented by counsel)
Alleged victim:	The author
State party:	Spain
Date of communication:	2 November 1997 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 31 March 2005,

Adopts the following:

Decision on admissibility

1. The author of the communication, dated 2 November 1997, is Aurelio Fernández Álvarez, a Spanish national, who alleges that he is the victim of torture and ill-treatment by Spain. Although the author has not alleged specific violations of any of the provisions of the Covenant, his complaint would seem to raise issues in connection with articles 7 and 10 of the International Covenant on Civil and Political Rights. The author is not represented by counsel.

The facts

2.1 When the author submitted his communication in November 1997, he was serving a sentence[1] in the penitentiary in Huelva, Spain. In his many letters addressed to the Committee he complains of having been held under the regime for extremely dangerous prisoners, under which various of his rights were violated. In particular, he complains of having been beaten and subjected to ill-treatment by prison officials in the various Spanish prisons where he has been incarcerated.

2.2 The author alleges that on several occasions in 1997, while he was being held in the Puerto I penitentiary in Cádiz, he and other prisoners in the isolation block were immobilized by being shackled to their beds. He adds that they were insulted, beaten and had gas sprayed in their mouths, were handcuffed to the bars of their cells and forced to remain naked. He further states that the food served to them had gone bad; they were prohibited from communicating with each other through the windows and were denied access to athletic facilities; they were not provided with any medical care and received death threats.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson López, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

2.3 In a letter dated 25 October 1999, the author informs the Committee that on 11, 12 and 17 September 1999 officials at the Madrid II penitentiary, where he was then being held, handcuffed him, forced him to strip naked and had him do deep knee bends for half an hour in their offices. He further alleges that they beat and kicked him every time he stopped to rest, and also held his head in a bucket of water from time to time. He maintains that he was forced to remain in solitary confinement for up to five days unattended. In a letter dated 9 June 2002, the author complains of further physical assaults similar to those that occurred in 1999.

2.4 With regard to the exhaustion of remedies, the author has attached various documents, according to which:

(a) On 17 August 1995 the prison supervision court removed the author from the list of inmates who are kept under close observation (the FIES regime).[2] On 8 January 1996, the Provincial High Court of Madrid upheld the prison supervision court's decision, despite which the author continued to be subject to the special regime.

(b) On 2 October 1996, when the author was an inmate at the Villanubla penitentiary, Valladolid, he filed a complaint with the Valladolid prison supervision court seeking to be released from the special regime. The author alleges that on 8 January 1996 the Provincial High Court of Madrid[3] had decided to remove him from the FIES roster, despite which he continued to be confined in "special wings", where he had remained for seven years and where, among other things, he was physically assaulted, handcuffed and subjected to strip-searches and received constant death threats. The court rejected his complaint on the grounds that the restrictions imposed on the author were consistent with the prison regime applicable to him under the Penitentiary Act, which stipulated that an inmate classified as being extremely dangerous must be held in closed facilities or in special wings. On 25 November 1996, the court rejected an application for review filed by the author. On 30 June 1997, the Provincial High Court of Valladolid rejected an appeal by the author.

Subsequently, the author filed an application for *amparo* with the Constitutional Court, alleging, among other arguments, the failure of the Provincial High Court to state the grounds for its decision. At the time he filed that application, the author was no longer in Valladolid but in the Puerto I prison, Cádiz. The author stated in his application that he continued to be subjected to degrading treatment and routine strip-searches; that he was not allowed to have newspapers; that he was denied access to athletic facilities; and that his belongings were treated roughly whenever there was a cell inspection. On 30 November 1998 the Constitutional Court rejected the application, holding that the restrictions imposed on the author were consistent with the prison regime applicable to him as a result of his classification as an extremely dangerous prisoner and that, regardless of whether or not he agreed with that classification and regime, the response of the judicial authorities could not be considered as contrary to the Constitution. With regard to that decision, the author submits the argument to the Committee that the court's decision referred only to the issue of classification and did not deal with the complaints of physical ill-treatment, torture, and degrading and humiliating treatment to which he had been subjected. The author considers that he has exhausted all domestic remedies.[4]

(c) On 13 March 1997, the author filed a complaint of ill-treatment against the authorities of the Puerto I penitentiary.

(d) On 1 October 1997 the author filed a complaint with the Huelva examining police court concerning incidents that occurred on 30 September 1997, at which time he was allegedly beaten and handcuffed by prison guards.[5]

(e) On 26 January 1998, the author filed a complaint against the director of the Moraleja penitentiary with the Palencia police court, alleging that he had been held in solitary confinement, had been subjected to ill-treatment and torture, had had his mail intercepted and had been denied permission to participate in scheduled activities and sports. The author again cited the failure to implement the decision of 8 January 1996. On 5 March 1998, the court ordered that the investigation should be closed, as no offence had been proved.

(f) On 4 May 1998, the author filed a complaint with the Oviedo prison supervision court, alleging that he had been the victim of ill-treatment. On 15 June 1998, the court upheld the author's complaint in part and concluded that the prison authorities had not fully justified a strip-search of the author on 2 May 1998.[6] The author filed an application for review of that decision, an application that was rejected by the court on 7 July 1998. The author filed an appeal with the Provincial High Court of Oviedo, which was rejected on 3 October 1998. The author filed an application for *amparo* with the Constitutional Court, which was rejected on 25 October 1999 on the grounds that the court of first instance had already resolved the matter.

(g) On 12 April 1999, the Constitutional Court rejected another application for *amparo* submitted by the author against the decision issued on 10 June 1998 by the Provincial High Court of Huelva concerning a complaint by the author that the prison authorities were not providing him with daily newspapers.

(h) On 8 June 1999, the Supreme Court accepted in part the appeal filed by the author against a ruling of the Disciplinary Commission of the General Council of the Judiciary dated 27 January 1995 to set aside a complaint lodged by the author in January 1995 against a prison supervision judge in Valencia for failing to resolve his claims concerning his prison situation in a timely manner. The Supreme Court's decision indicates that the author had complained to the judge in order to be allowed to take walks individually. The author maintains that, despite the decision of the Supreme Court, the Council took no action in that regard.

2.5 The author has also submitted the decision of the European Commission of Human Rights of 25 November 1996 concerning a complaint of ill-treatment during various incidents that took place in August 1993, October 1994, December 1994, May 1995 and October 1995. The Commission found the complaint inadmissible because domestic remedies had not been exhausted, since the author had not applied to the Constitutional Court.

The complaint

3.1 The author's basic allegation is that he has been subjected to inhuman and degrading treatment and torture in the Spanish prisons where he has been incarcerated under the special regime. He adds that the authorities have not taken any measures to reintegrate or rehabilitate him, and that one proof of this is that prisoners are denied access to newspapers.

3.2 The author alleges that, even though he was removed from the FIES roster by decision of 8 January 1996 of the Provincial High Court of Madrid, the prison authorities continued to subject him to a regime that restricted his rights.

The State party's observations on admissibility and the merits

4.1 In its notes verbales dated 21 April 1999 and 23 August 1999, the State party maintains that the communication is inadmissible on the basis of article 5, paragraph 2 (a), of the Optional Protocol, since the author submitted the same matter to the European Commission of Human Rights. In its decision of 25 November 1996, the Commission found the complaint inadmissible. The State party also maintains that the communication should be found inadmissible in accordance with article 5, paragraph 2 (b), inasmuch as the author has not exhausted domestic remedies. It adds that the author has simultaneously brought his complaints before many domestic and international bodies, and that when he has brought his claims to the competent judicial organs, they have resulted in reasoned decisions. It points out that the author generally fails to inform the Committee of rulings that have been favourable to him.

4.2 According to the State party, some of the incidents reported by the author were subsequently addressed by means of judicial decisions in his favour. It adds that the complaints that were rejected were given thorough and rational consideration, and that the author did not make use of the proper remedies. The State party affirms that the author was removed from the FIES roster by order of the Madrid prison supervision court dated 17 August 1995, as confirmed by an order of the Provincial High Court of Madrid dated 8 January 1996, and that that ruling is being implemented.

4.3 The State party adds that the author complained of having been forced to undergo a strip-search at the Villanubla penitentiary, and the Valladolid prison supervision court upheld his complaint, holding that full searches could only be made when there were grounds for believing that prisoners were in possession of banned objects. The State party maintains that the complaints submitted by the author and other inmates on 13 March 1997 concerning ill-treatment that allegedly occurred in the Puerto I penitentiary were rejected on 20 May 1997 by the El Puerto prison supervision court. It adds that the complaint of ill-treatment that allegedly occurred in May 1997 in the same penitentiary was also rejected by the El Puerto prison supervision court. There is no indication that the author appealed these decisions.

4.4 In its submission of 26 October 1999, the State party adds that the author, by his constant complaints of ill-treatment by the prison authorities, is engaging in a kind of *actio popularis* that does not fall under established procedures.

The author's comments

5.1 In his letter of 25 October 1999 and other subsequent letters, the author insists that he has exhausted all domestic remedies and submits copies of many documents sent to administration and judicial authorities in that regard.

5.2 The author has also submitted copies of two newspaper articles. One article, dated 22 November 1999, refers to the alleged ill-treatment of the author and the complaints filed; the other refers to complaints of ill-treatment in Spanish prisons.

Additional observations of the parties

6.1 On 4 March 2002, the author sent the Committee copies of 13 forensic reports from various courts[7] dating from September 1998 to February 2001. He also sent a medical report of injuries from the Valencia penitentiary dated December 1994. All these reports describe a variety of contusions, abrasions and bruises.

6.2 On 23 October 2002, the State party informed the Committee that the author was classified as an extremely dangerous prisoner, in treatment level I, under article 93, paragraph 1, of the Penitentiary Regulations, and that he was subject to the regime applicable to that classification, which was independent of the FIES regime, to which the author was no longer subject. The State party also reported that Madrid prison supervision court No. 5, in decisions dated 30 March 1999, had rejected two complaints by the author regarding his classification, finding it to be appropriate in view of his poor conduct in prison. There is no indication that the author has exhausted domestic remedies in regard to these judicial decisions. The State party reiterates that there has been no violation of the Covenant in this case.

6.3 By note verbale dated 6 November 2002, the State party stated that the author had arrived at the Madrid II penitentiary on 14 September 1998 classified as level I. On 17 February 1999 the penitentiary had decided to cancel the existing disciplinary sanctions and disciplinary file against him and to place him under an ordinary regime. However, the author did not cooperate with the prison authorities. After four days under the new regime he attacked a prison guard and broke his hand; with the approval of the prison supervision court he was returned to a level I prison regime in the isolation block.[8] In relation to this incident he was subsequently convicted of assault and battery and assaulting a person in authority. The State party adds that the author displays very poor behaviour and is involved in daily incidents, insults, threats and attacks; he was written up for disciplinary matters 19 times in 2000, 58 times in 2001 and 16 times up to that point in 2002. From April 1999 to January 2002, the author submitted 29 complaints against the prison authorities to the prison supervision courts on various grounds. All those complaints were rejected. From April to June 2002, another six complaints brought by the author were rejected by prison supervision courts or by the Provincial High Court of Madrid.

Issues and proceedings before the Committee

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the complaint is admissible under the Optional Protocol to the Covenant.

7.2 The State party maintains that the author's communication must be ruled inadmissible on the basis of article 5, paragraph 2 (a), of the Optional Protocol because the same matter was submitted to the European Commission of Human Rights. In this connection, the Committee notes that the Commission's decision refers to presumed violations that are alleged to have occurred between August 1993 and October 1995, in relation to which the author submitted to the Committee a medical report of injuries dated 22 December 1994. That part of the communication must therefore be considered inadmissible according to article 5, paragraph 2 (a), of the Optional Protocol.

4.10 As to the lack of a public hearing in these proceedings, in the State party's view there has been no violation of article 14, paragraph 1, of the Covenant. Referring to domestic law in this regard, it points out that, while the Regional Court hearings were held in chambers, i.e., were not open to the public, the Appeal Court hearings were held in public. Moreover, the Regional Court handed down its judgement in open court.

4.11 As to the length of the proceedings, the State party notes that, contrary to the authors' claim, this case involved not one but four distinct sets of proceedings, each with a different objective. The last two, which extended over seven and six years respectively, were complicated, particularly as regards assessment of Mr. Deperraz' management shortcomings. In this regard, the State party recalls the Committee's decision finding communication No. 831/1998 inadmissible on the grounds that the author had not sufficiently established that the length of the procedure before the French administrative authorities had caused him genuine harm.[3]

Authors' comments

Comments on admissibility

5.1 In their comments of 4 August 2003, the authors contest the State party's observations on admissibility. They assert that article L 781-1 of the Judicial Code in fact establishes a highly restrictive, unworkable form of State responsibility. They refer to a Court of Cassation ruling of 23 February 2001 showing that case law, at least at the highest level, applies stringent criteria in determining the existence of gross negligence or a denial of justice, concepts that are in themselves already restrictive. The Court goes on to state that the reparation sought is rarely obtained other than for the most blatant of errors or particularly grotesque aberrations and the solution adopted by the European Court of Human Rights, in its rulings of November 2000 and September 2001, in effect contradicts its own case law. Moreover, those rulings post-date the final judgement in the present case handed down by the Court of Cassation on 14 March 2000. The Committee should not therefore require exercise of the remedy provided under article L 781-1.

5.2 The authors state that they have spent years drawing attention to the miscarriages of justice, errors and irregularities to which they have been exposed and that they have taken specific complaints of violations of the right to a defence and of the principle of adversarial proceedings all the way up to the Court of Cassation.

5.3 The authors reject as groundless the State party's claim that they did not appeal the 18 April 1990 judgement. No valid appeal could be entered against a ruling that had been struck down as contrary to public policy.

Comments on the merits

5.4 The authors also reject the State party's observations on the merits. They again describe the irreparable effects of the 6 November 1985 judgement and point out that the winding-up order against Le Praley issued on 22 May 1991 was revoked nearly a year later. Yet the provisional execution of that order had prevented the company from collecting any rent and had hastened its financial decline. Moreover, the domestic courts had ultimately disregarded the fact that the 18 April 1990 ruling placing the affairs of Le Praley under court supervision had been struck down, since the 24 September 1996 judgement eventually confirmed the partnership's liquidation.

5.5 As to evidence of the existence of a judgement handed down on 6 October 1993, the authors point out that there is a letter sent by their lawyer on 22 February 1994 to the Bonneville Regional Court to the effect that the court registry had notified his office by telephone on 7 October 1993 that the judgement had been handed down on 6 October 1993. The lawyer had informed the authors of this judgement in writing on 12 October 1993.

5.6 As to the allegations of mismanagement by Mr. Deperraz, the Appeal Court, in its 24 September 1996 ruling, accepted, of its own motion, a fresh complaint under article 68 of the Act of 24 July 1966, which states: "The cumulative losses may not exceed half the capital without measures being taken to correct the situation." This complaint was never discussed either in the lower court or in the Appeal Court which brought the matter up, despite the fact that Mr. Deperraz was present during the proceedings and duly represented by counsel.

5.7 In the authors' view, there is no justification for the failure to hold public hearings. The fact that the domestic courts handed down their judgements in open court has no bearing on the public nature of the proceedings themselves.

5.8 Lastly, with regard to the unreasonably lengthy proceedings, the authors consider that the State party's division of the proceedings into four separate phases is artificial. If the Deperraz company had not been wound up in error in 1985, Mr. Deperraz would never have been ordered to cover the debt and the liquidation order would never have been extended to cover Le Praley as well, the whole leading up to a judgement by the Court of Cassation on 14 March 2000. The authors cannot be reproached for having legally exercised the remedies available to them.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained, as it is required to do under article 5, paragraph 2 (a), of the Convention, that the same matter has not been, and is not being, examined under another procedure of international investigation or settlement.

6.3 The authors allege a violation of article 14, paragraph 1, of the Covenant on the grounds that their case was not given a fair hearing by the domestic courts. They claim to have been the victims of judicial errors and violations of the right to a defence and the principle of adversarial proceedings. The State party contests the admissibility of these claims, pointing out that the authors are in effect attempting to challenge decisions handed down by the domestic courts that have in every case been extensively and closely argued. The Committee notes that the alleged errors and violations, including the erroneous winding-up of Deperraz Electricité on 6 November 1985, the automatic placing of Le Praley's affairs under court supervision and the judgement made against the first author following proceedings that did not respect the adversarial principle, were examined by the domestic courts. When such courts found errors in earlier judgements such errors were rectified. In this respect, the Committee recalls its jurisprudence under which it is generally a matter for domestic courts to examine the facts and evidence in a particular case, unless it is clear that their assessment was arbitrary or that it amounts to a denial of justice. The arguments advanced by the authors and the evidence adduced to this purpose do not show that the judicial decisions suffered from defects that might warrant admitting this part of the communication. Accordingly, the Committee considers that the authors have not provided sufficient substantiation for their complaint of a violation of article 14, paragraph 1, and finds this part of the communication inadmissible under article 2 of the Optional Protocol.

6.4 The authors also claim to be victims of a violation of article 14 of the Covenant by virtue of the unreasonable length of the proceedings in the domestic courts and the lack of public hearings. In the State party's view, the complaint should be declared inadmissible in this regard on the grounds that domestic remedies have not been exhausted. The Committee recalls that the author of a communication must have brought a substantive complaint in the domestic courts in respect of any allegation subsequently brought before the Committee and that mere doubts about the effectiveness of an available remedy do not absolve the author of a communication from exhausting it.[4] These elements of the complaint are thus inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under articles 2 and 5, paragraph 2 (b), of the Optional Protocol of the Covenant;

(b) That this decision shall be communicated to the authors and to the State party.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] *Paul Triboulet v. France*, Views adopted on 29 July 1997.

[2] Judgement of 7 September 1994, p. 2.

[3] *Michael Meiers v. France*, decision of 16 July 2001.

[4] See, for example, communication No. 661/1995, *Paul Triboulet v. France*, para. 6.4.

Q. Communication No. 1127/2002, *Karawa v. Australia* (Decision adopted on 21 July 2005, eighty-fourth session)*

Submitted by:	Elizabeth Karawa, Josevata Karawa, Vanessa Karawa (represented by counsel, Anne O'Donoghue)
Alleged victim:	The authors
State party:	Australia
Date of communication:	19 September 2002 (initial submission)
Subject matter:	Proposed removal of parents of an Australian minor to Fiji after significant passage of time in Australia
Procedural issues:	Exhaustion of domestic remedies
Substantive issues:	Arbitrary interference with family - Protection of family unit - Protection of minors
Articles of the Covenant:	17, 23, paragraph 1, and 24, paragraph 1
Articles of the Optional Protocol:	5, paragraph 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 21 July 2005,

Adopts the following:

Decision on admissibility

1. The authors of the communication are Elizabeth and Josevata Karawa, both Fijian nationals born in Fiji in 1968 and 1967, respectively. They bring the communication on their own behalf and on behalf of their daughter Vanessa Karawa, an Australian national at the time the communication was submitted, who was born in Australia on 24 February 1989. The authors claim that their expulsion from Australia to Fiji would amount to a violation by Australia of articles 17, 23, paragraph 1, and 24, paragraph 1, of the Covenant. They are represented by counsel.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Nigel Rodley, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Pursuant to rule 90 of the Committee's rules of procedure, Committee member Mr. Ivan Shearer did not participate in the adoption of the present decision.

The facts as presented

2.1 In 1987, the authors, both at that time illegally in Australia after their temporary permits had expired, started a relationship. In February 1989, a daughter was born to them, who later, upon reaching the age of 10, became an Australian citizen. In 1990, Mrs. Karawa applied (including her husband and daughter in the application) for a protection visa on the advice of a migration agent who suggested that an application for refugee status was the only available course to achieve a legal presence in Australia.

2.2 On 31 July 1995, the (then) Department of Immigration and Ethnic Affairs refused the application, finding that the harm or mistreatment claimed in the event of a return to Fiji was not sufficient to amount to persecution. On 22 August 1995, the authors engaged a second migration agent to appeal to the Refugee Review Tribunal (RRT). An application for review was lodged. On 12 January 1996, the RRT received "signed and dated written advice" withdrawing the application. On 2 May 1996, Mr. Karawa, with the support of his employer, made an unsuccessful application for a visa under the Employment Nomination Scheme.

2.3 In 2000, the authors, having allegedly not heard the outcome of the RRT appeal, engaged the second migration agent to add them to a class action. They obtained bridging visas on the basis of the class action application. In May 2001, the migration agent advised that the class action had been refused, but that another class action had been commenced. The authors engaged the agent to add them to this second action. In July 2002, having heard of the decision on the second action, the authors were advised upon inquiry of the agent that they had not been included in the action as they had never applied to the RRT. The authors argue that "it thus appeared that [the agent] had never applied for review to the RRT as [Mrs. Karawa] had requested and paid for".[1]

2.4 As, according to the Migration Act, an application to the RRT must be made within 28 days of the relevant decision, the passage of six years meant that review rights of the original immigration decision had been lost. Moreover, the authors were allegedly unable to apply for any other substantive on-shore visas, with the exception, with leave of the Minister, of a further protection visa under section 48 B of the Migration Act.

2.5 On 24 July 2002, Mrs. Karawa wrote to the Minister for Immigration and Multicultural and Indigenous Affairs and the Minister for Citizenship and Multicultural Affairs, seeking to remain in Australia. She was advised that there was no option but to leave Australia, for which she was granted a bridging visa in order to obtain a Fijian passport and make the necessary arrangements. On 12 August 2002, Vanessa Karawa wrote to the Ministers and, citing provisions of the Convention on the Rights of the Child, requested that her parents be permitted to remain.

2.6 On 10 September 2002, the Minister for Immigration and Multicultural and Indigenous Affairs responded to the effect that he had no legal power to intervene, as no appeal to the RRT had been resolved against the authors. He advised of a number of migration visa applications, including family-based options, that the authors might wish to consider making from outside of Australia.

2.7 On 30 September 2002, the authors' bridging visas expired and they became unlawful non-citizens, with their whereabouts unknown. Steps will be taken by the Australian authorities to remove them from Australia if they are found.

The complaint

3.1 The authors allege that their removal to Fiji would violate articles 17, 23, paragraph 1, and 24, paragraph 1, of the Covenant. In their view, to have Vanessa remain in Australia is not an option, while they do not feel they can take her to Fiji with them. They argue that if Vanessa returns to Fiji, she will be isolated and stigmatized in their home village, as a result of an earlier failed marriage of her mother. The authors point out that Vanessa is an above average student, has neither Fijian friends nor any desire to live there. Neither does she possess knowledge of the Fijian language or culture. The authors and their daughter are also "highly involved" in church life and the community.

3.2 The authors contend that an application for a parent visa made from outside Australia would take "several years" to resolve. The Department of Immigration's own documentation indicates that in view of the large number of applicants for the 500 visas annually available in this category, "a very substantial wait" can be expected.

3.3 In the authors' view, the case is "in principle" no different from that in *Winata et al. v. Australia*.[2] They argue that the notion of "family" in the Covenant is to be interpreted broadly, and that the relationship between the authors and their daughter clearly qualifies as such. In addition, an expulsion separating parents from a dependent child, as would in their view occur in the present case, amounts to "interference" within the meaning of article 17.[3] Finally, while lawful under Australian law, the removal of the parents is arbitrary. They explain that the only means by which separation may be avoided would be for Vanessa to leave with them and relocate to Fiji. In their view, this would not be in accordance with the provisions, aims or objectives of the Covenant, nor be reasonable in the circumstances, as Vanessa is fully integrated into Australian society, has never been to Fiji and has no cultural ties to that country. It would also be unreasonable, in their view, to expect Vanessa to remain in Australia while the parents are removed. Thus, the authors regard their removal as being contrary to articles 17, 23, paragraph 1, and 24, paragraph 1, of the Covenant.

3.4 The authors support this conclusion by referring to articles 8 and 12 of the European Convention on Human Rights and Fundamental Freedoms, although they regard these provisions as providing a lesser protection than the Covenant. The authors suggest that the interpretation of the Covenant should take a liberal approach, as allegedly taken by the European Court, to cases of non-citizens in existing families who are present in a State.

3.5 On 7 January 2003, the authors supplied a consultant psychiatrist's report on the family, dated 29 September 2002. The report states that Mrs. Karawa has no significant family connections to Fiji, having only a step-brother there. She felt rejected by her extended family as a result of a failed marriage. Her father lives in Sydney, Australia. Mr. Karawa has three married sisters living in Fiji, but no family or friends there that could support his family if he was returned to Fiji. According to the psychiatrist, Vanessa is "very close" to her parents, and, while proud of her Fijian background, "does not identify strongly with Fijian society". In his view, Vanessa remaining alone in Australia is "hard to imagine" and would be "emotionally and psychologically catastrophic". On the other hand, moving to Fiji would be "extremely difficult".

Her education "would probably cease or be abbreviated" on account of the costs, while she would be "quite lost" in the culture due to a lack of language or cultural knowledge. Her Indian physical features, while not pronounced, "could lead to difficulties". Transferring her from a positive multicultural society to a bicultural society with recent racist experiences would be "extremely cruel", the effects of which would be compounded by her family being "economically crippled".

The State party's submissions on the admissibility and merits of the communication

4.1 By submissions of 10 September 2003, the State party disputed both the admissibility and the merits of the communication. On the facts, the State party observes that in 1986 Mrs. Karawa was served, and signed an undertaking to comply with, a "Requirement to Leave Australia" form, following expiry of her temporary permit. This was after an application for divorce in 1986 by Mrs. Karawa's first husband, in circumstances where she had arrived in Australia and only stayed with him a few days. She did not depart and, with her parents in Australia, ceased contact with the Australian Department of Immigration. Between 1986 and 1988, numerous attempts were made to locate her.

4.2 The State party regards the claim under article 17 as inadmissible for failure to exhaust domestic remedies. It contends that the family withdrew its application to the RRT on 12 January 1996. Even if the RRT had decided against them, they could have either pursued review in the Federal Court and subsequently the High Court, or alternatively applied directly to the High Court in its original constitutional jurisdiction. The State party also argues that the authors' contentions do not come within the purview of article 17 or any other right recognized by the Covenant, and thus are inadmissible under article 3 of the Optional Protocol, as well as being insufficiently substantiated for purposes of admissibility, and inadmissible under article 2.

4.3 On the merits of the article 17 claim, the State party observes that the proposed action is plainly lawful. The State party regards "interference" with the family unit as an act inevitably separating a family unit (rather than simply a substantial change to long-settled family life). In the present case, removal of the parents will not have this effect: the entire family, including Vanessa, are free and have the right to leave Australia and enter Fiji. Doing so would not affect Vanessa's Australian citizenship. In addition, as a child of Fijian nationals, she has been exposed to a degree of Fijian culture in Australia and has developed a level of cultural affinity with Fiji. While moving to Fiji may involve a temporary disruption of the normal pattern of family life, this is not "interference" within the meaning of article 17.

4.4 The State party argues that it does not follow from one family member's entitlement to remain in Australia that other family members, nationals of another State, are also so entitled. Requiring two nationals of another State to return home cannot amount to "interference" with the family simply because they have had a child in Australia. While the family has remained in Australia for 14 years, it has been there without lawful authority. Mr. and Mrs. Karawa cannot rely on illegal actions as the basis of their claim. The State disputes that Vanessa relocating to Fiji would not be in accordance with the provisions, aims and objectives of the Covenant. Australia is not requiring her to leave or remain in Australia - that is a parental decision. It is also common for families to move interstate or overseas, taking children with them. The purpose of the Covenant cannot be to prohibit children moving with families. Finally, as Vanessa can obtain Fijian citizenship by registration (while retaining Australian citizenship), all three family members can live in a country of which they are nationals.

4.5 Even if, in the light of these arguments, the Committee were to consider that "interference" occurred, the State party regards it as not arbitrary and thus not contrary to article 17. The notion of arbitrariness includes notions of capriciousness, injustice, unpredictability, disproportionality or unreasonableness. The State party refers to its sovereign right in international law to determine the entry and presence in the country of non-nationals. The right to control migration is regulated by comprehensive laws and policies, which seek to strike a balance between the need to allow people to come and go from Australia, and other aspects of the national interest. The migration program is carefully planned and managed in the national interest, to balance Australia's social, economic, humanitarian and environmental needs. The number of legal migrants and refugees is decided each year by the Government after extensive consultations with the community.

4.6 In order to maintain the integrity of this program, Australian law provides provide for the removal of persons with no right to be or remain in Australia. The consistent application and enforcement of these laws is an important part of maintaining the legitimacy of the migration program and the rule of law in Australia. These laws are reasonable and not arbitrary, are based on sound principles of public policy that are consistent with Australia's standing as a sovereign nation and with its Covenant obligations. They are predictable, widely-known and consistently enforced, without discrimination.

4.7 Accordingly, the State party submits that the Views of the majority in *Winata*[4] should not be applied, as it does not accept that it should refrain from enforcing its migration laws wherever unlawful non-citizens are said to have established a family life. The State party observes that the dissenting members pointed out that article 17 referred to interference with family, rather than family life. They also observed that the interpretation in effect conferred a right to remain on persons founding a family and managing to escape detection for a sufficiently long period, an interpretation that, in their view, "ignores prevailing standards of international law". The dissenting members also referred to the unfair advantage such an approach conferred on persons who circumvented immigration requirements over those who had not.

4.8 In response to the authors' reference to article 8 of the European Convention, the State party observes that a list of permissible exceptions to the right such as contained there was deliberately omitted from the draft of article 17 of the Covenant, in order to give States a wide discretion to determine permissible forms of interference. In addition, under article 8 of the European Convention, interference must be "necessary" to be consistent with the article, which is a stricter standard than an absence of arbitrariness required under article 17 of the Covenant.

4.9 On the basis of these principles, the State party argues that application of its removal laws to the authors would not be arbitrary. Rather it will be the foreseeable, predictable application of laws known to them since 1986. Both had signed government forms recognizing that removal may follow after unlawful presence in Australia, and the effect of the law was explained to them numerous times over a 15-year period. Such an application of law cannot be arbitrary. The State party points out that it was a result of the family's withdrawal of their RRT application, and the subsequent absence of any RRT decision, that the Minister decided he had no power under law to substitute a more favourable decision. Currently, the authors are not lawfully in Australia, and the Covenant does not confer a right to choose a preferred migration destination. During the short periods in which their status in Australia was lawful, they availed themselves of all procedural guarantees and instituted all proceedings available at law to them.

Throughout these proceedings, it was made clear that if they did not obtain permanent residency or if visas expired, they would have to leave. In summary, the authors' claims show little more than that they wish to remain in Australia and would experience some disruption if required to move to Fiji.

4.10 The State party argues that the claim under article 23, paragraph 1, is insufficiently substantiated, for purposes of admissibility, as the authors direct their argument towards establishing an alleged interference with the family in breach of the negative obligation in article 17 on the State party to refrain from certain action. Article 23, by contrast, comprises positive obligations on the State party to act to protect the family as an institution, and it is not the case that any breach of article 17 ipso facto also establishes a breach of article 23. In the absence of any further argument by the authors as to how a violation of article 23 has been made out, therefore, this claim should be declared inadmissible.

4.11 On the merits of the claim, the State party submits, in detail, that it plainly meets the obligation, at State and federal level, of institutional recognition and support of the family unit and the resource investment commensurate with such recognition, including in the area of child protection. The State party respects the fact that the authors and their daughter are a family unit, and does not seek to separate or destroy that unit. The daughter, who the State party states has the right as a child of Fijian nationals to enter and live in Fiji and become a citizen by registration,[5] may travel with the family. There is nothing to suggest relocation will harm her, and there is little reason to suppose she could not do so successfully, as children commonly do. Even if she experiences some inconvenience or period of adjustment to new surroundings in Fiji, this does not amount to a breach of Covenant rights. If, by contrast, the parents elect for her to remain in Australia, that is a choice of theirs that is not required by the State party.

4.12 The State party submits that article 23, paragraph 1, must also be read against States' acknowledged right in international law to control entry, residence and expulsion of aliens. While Australia protects families within its jurisdiction, this protection must be balanced with the need to take reasonable measures to control immigration. This is a right recognized in articles 12 and 13 of the Covenant. It points out, with reference to its third periodic report under the Covenant, that it implicitly and explicitly recognizes the importance of the family as the fundamental social unit.[6] One significant example in recognition thereof is the creation of a special visa class, with particular privileges, for parents to apply for in order to live in Australia with their children.

4.13 Concerning the claim under article 24, paragraph 1, the State party argues that this claim is also insufficiently substantiated, for purposes of admissibility. As with article 23, article 24 is a positive obligation on the State party requiring it to act to take measures concerning the protection of children, and a breach thereof is not necessarily established by information directed at establishing a breach of the negative obligation in article 17 to refrain from action. As the authors direct arguments at establishing an interference with article 17 and do not supply additional evidence as to article 24, this claim should be declared inadmissible.

4.14 As to the merits of the claim, the State party argues that, in fulfilment of its positive obligation to provide special protection to children, it has implemented a number of laws and policies designed specifically to protect children and to provide assistance for children at risk. Vanessa is afforded the same measures of protection as other Australian children, aimed at ensuring their health, safety and well-being. There are highly developed systems of family law, child protection law and criminal law, with States and Territories possessing government departments responsible for administering programs and policies of child protection. Special police units are dedicated to preventing and solving crimes against children. These and other measures are outlined in the State party's initial report under the Convention on the Rights of the Child,[7] as well as its third periodic report under the Covenant.[8] If Vanessa remains in Australia, she will continue to enjoy this protection, with or without her parents. There is nothing to suggest that she would not adjust to the changes necessary in relocation, and if she remains in Australia, her parents have the option of applying, from Fiji, for an off-shore parent visa. The authors' claim that the State party has not provided Vanessa with the required measures of protection is therefore without any merit.

The authors' comments on the State party's submissions

5.1 By letter of 13 January 2004, the authors disputed the State party's observations. On the admissibility of the case, while counsel describes the application to the RRT as "apparently withdrawn by the applicants", he argues that that proceeding was concerned with refugee status. In his view, requiring the authors to have pursued this avenue on merits review to the RRT and thereafter in the courts by judicial review was rejected in *Winata* and should again be rejected. Rather, the current claim relates to a "separate and distinct" claim relating to family unity and stability. The authors thus argue that if the State party's argument were taken to its logical conclusion, each author would have to make an application for every conceivable category of visa and exhaust domestic remedies on that application, prior to approaching the Committee.

5.2 On the merits, the authors argue that Vanessa, aged 14 and an Australian citizen since the age of 10, has lived all her life and undertaken all her schooling in Australia. Her parents, by contrast, must be removed "as soon as is reasonably practicable" under the terms of the Migration Act. Vanessa is thus left with the choice of leaving Australia with her parents or remaining without them. While conceding that it is "reasonably common" for children to relocate with their parents, the authors argue that in Vanessa's case such relocation would be forced on her as an Australian citizen, "by the pernicious operation of two Australian statutes, as well as by her youth and familial ties." The application of Australian law to this case is thus said to be arbitrary, and to fall factually into the exceptional circumstances identified in *Winata*.

5.3 The authors dispute the State party's view that "interference" with a family requires the necessary separation of its members. Interference may also result from disruption to its usual way of life, or by causing it to do something it may not otherwise do, such as to relocate or to separate. For the authors, the choice imposed on the family by the combined operation of the Citizenship Act and the Migration Act violates articles 23 and 24 of the Covenant. The State party's obligations to protect family and children go beyond simple enactment of protective laws to require remedial legislative action to protect the integrity of the families in the authors' situation.

Supplementary submissions by the State party

6. By Note of 31 March 2004, the State party reaffirms its original argument, in addition disputing the characterization of the authors' claim before the Committee as a separate and distinct claim relating to family unity and stability that had nothing to do with their refugee

applications. The State party observes that the claim for protection against possible future separation of the family unit was expressly referred to in the claim for a protection visa. Ms. Karawa's application for a protection visa, dated 24 September 1990, expressly stated by way of information relevant to her claim that she had very strong ties with Australia, having been there since 1985, and having an Australian-born child as well as immediate family who were Australian citizens and residents. As a result, a request for review by the RRT was an available domestic remedy that offered a reasonable prospect of success.

Issues and proceedings before the Committee

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

7.2 The Committee recalls that article 5 (2) (b) of the Optional Protocol requires that individual applicants must have exhausted available domestic remedies. The Committee recalls that in the case of *Winata v. Australia*,[9] the authors had sought a review of their case before the independent Refugee Review Tribunal (RRT). On the overall record of that particular case, the Committee went on to subsequently determine that, in the specific circumstances, the authors could not be required to pursue further review of the adverse RRT decision in the courts. In the present case, by contrast, the authors applied to, and then withdrew, their case from the first independent review instance competent to address their case, the RRT. The Committee refers to its jurisprudence that when an author has initiated a remedy before an independent tribunal on his or her own motion, the Committee requires such proceedings to be properly exhausted.[10] This is especially so when the authors have, as in the present case with respect to family life issues, made a live question before the domestic authorities of the same issues as those advanced to the Committee (see paragraph 6, supra). The authors' withdrawal of their application before the RRT thus deprived both the State party of any opportunity to address the authors' claims before its own administrative appeals tribunal and through subsequent judicial review. The Committee observes in this respect that whether the application to the RRT was withdrawn by the authors or by their representative(s) is immaterial, as according to the Committee's jurisprudence the conduct of counsel is generally imputed to the authors. In the absence of any information to suggest why the withdrawal of the application to the RRT is not imputable to the authors, it follows that the communication must be considered inadmissible, pursuant to article 5, paragraph 2 (b), because of failure to exhaust domestic remedies.

8. The Committee therefore decides:

(a) That the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol;

(b) That this decision shall be communicated to the author and to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] The authors however supply a letter of the RRT, dated 22 August 1995, confirming that an application for review had been lodged with it that day.

[2] Case No. 930/2000, Views adopted on 26 July 2001.

[3] The authors cite *Moustaquim v. Belgium* (European Court of Human Rights, judgement of 18 February 1991) for this proposition.

[4] Op. cit.

[5] The State party refers to sections 21 and 25 of the Fijian *Citizenship Act (Amendment) Decree* 2000. Section 25 provides for entry and residence into Fiji of any child of a citizen.

[6] CCPR/C/AUS/98/3, at para. 1137.

[7] CRC/C/8/Add.31.

[8] Op. cit.

[9] Op. cit.

[10] See, for example, *Baroy v. The Philippines*, case No. 1045/2002, decision adopted on 10 November 2003, and *Benali v. The Netherlands*, case No. 1272/2004, decision adopted on 11 August 2004.

R. Communication No. 1182/2003, *Karatsis v. Cyprus* (Decision adopted on 25 July 2005, eighty-fourth session)*

Submitted by:	Mr. Savvas Karatsis (represented by counsel, Mr. Achilleas Demetriades)
Alleged victim:	The author
State party:	Cyprus
Date of communication:	29 November 2001 (initial submission)
Subject matter:	Revocation of temporary appointment of judge to another post within the judiciary - Alleged bias of Supreme Court judges
Procedural issues:	Substantiation of claims by author - Admissibility *ratione materiae*
Substantive issues:	Right to a fair hearing by an impartial tribunal - Right to access to public service on general terms of equality - Right to an effective remedy
Articles of the Covenant:	2 (3), 14 (1) and 25 (c)
Articles of the Optional Protocol:	2 and 3

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 July 2005,

Adopts the following:

Decision on admissibility

1. The author of the communication is Mr. Savvas Karatsis, a Cypriot national, born on 23 December 1952. He claims to be a victim of a violation by Cyprus[1] of article 14, paragraph 1, read alone and in conjunction with article 2, paragraph 3, of the Covenant. In a subsequent submission (see paragraph 5.1), he also claims a violation of his rights under article 25 (c) of the Covenant. The author is represented by counsel, Mr. Achilleas Demetriades.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Factual background

2.1 On 11 January 1994, the author was appointed to the post of Family Court judge, a position that he continues to hold until today. In June 2000, he applied for a vacant post of District Court judge offering better promotion opportunities, a higher salary scale and higher pension benefits. On 12 July 2000, the Supreme Council of Judicature ("the Supreme Council"), a panel responsible for the appointment and promotion of judges under the Administration of Justice Law (1964), whose 13 members also sit as Supreme Court of Cyprus, selected the author for a temporary post as District Court judge for a period of one year from 1 October 2000, subject to the condition that he would resign from his post of Family Court judge before taking up his function at the District Court. At the end of that period, the Supreme Council would decide about his appointment as permanent judge and civil servant.

2.2 On 14 July 2000, acting on instructions from the Supreme Court, the Chief Registrar communicated with the author. After the author had accepted the conditions of appointment, including his prior resignation from the post of Family Court judge, the Chief registrar sent him an offer of appointment to the post of District Court judge (with the starting salary of the scale for District Court judges) and advertised the author's post of Family Court judge. By letter of 19 July 2000, the author accepted the written offer of appointment, which did not contain a proviso on his resignation from the post as Family Court judge.

2.3 On 26 September 2000, the Chief Registrar sent the author the following letter together with the document of his appointment to the temporary post of District Court judge:

> "Further to the letter offering appointment dated 13 July 2000 and its acceptance by you by your letter dated 19 July 2000, I forward to you the relevant document of your appointment to the post of temporary district judge.
>
> 1. It is noted that, as you have been informed, a prerequisite to your appointment is your resignation from the post of judge of the Family Court before the assumption of your duties.
>
> 2. Provided the above [is] observed, you will take the judicial oath and will give the affirmation to the Republic for the post of temporary district judge next Monday, 2 October 2000, at 8.00 a.m. at the Supreme Court."

2.4 On 2 October 2000, the author objected to the condition of prior resignation from his post as Family Court judge, which he believed to have been dropped, as it had not been included in the written offer of appointment. He argued that such resignation would result in a reduction of his annual salary by CYP£ 10,000.00, loss of benefit of his more than six years of service in the Family Court, including loss of his pension benefits, and uncertainty of tenure as it was not sure whether he would be permanently appointed at the end of the one-year period. He would only accept the "new condition" of prior resignation in the event of permanent appointment to the post of District Court judge on a scale which corresponds to the salary of a Family Court judge with more than six years' service and if any acquired rights were preserved.

2.5 On the same day, the Chief Registrar informed the author that his appointment had been revoked, as he did not accept the conditions of such appointment. On 4 December 2000, the author filed a complaint with the Supreme Court, challenging the Supreme Council's notification of 26 September 2000 on the basis that it purported unilaterally to change the terms of his employment contract. The author also challenged the Council's decision of 2 October 2000 revoking his appointment. The case was first referred to a single judge of the Court but later assigned to the full Supreme Court by the Chief Registrar. On 23 January 2001, the author, by reference to article 153 (9)[2] of the Constitution of Cyprus, applied for his case to be heard by a different bench, arguing that the 13 judges of the Supreme Court were the very authors of the impugned decisions, which they had taken in their capacity as members of the Supreme Council.

2.6 By judgement of 15 March 2001, the Supreme Court dismissed the case for want of jurisdiction without addressing the issue of impartiality.[3] It held that the appointment of judges is an exercise of the judicial rather than the executive or administrative power, thus falling within the exclusive competence of the Supreme Council and outside the Supreme Court's jurisdiction under article 146 of the Constitution of Cyprus.[4]

2.7 On 25 May 2001, the author filed an application with the European Court of Human Rights, alleging that the Supreme Court's lack of impartiality, the denial of an effective remedy to challenge the Supreme Council's decision and the reduction of his salary and pension benefits in the event of his resignation from the post of Family Court judge violated articles 6 and 13 of the European Convention on Human Rights and article 1 of Protocol No. 1 to the Convention.

2.8 On 31 May 2001, the European Court's Registrar informed the author of the possible obstacles to the admissibility of his application, namely the inapplicability of articles 6 and 13 of the Convention to public law disputes irrespective of pecuniary character, as well as the inapplicability of article 1 of Protocol No. 1 in the light of the fact that the author had not been deprived of his pension rights as a Family Court judge and that he had not acquired any such rights as a District Court judge.

2.9 On 14 June 2001, the author insisted on registration of his application, arguing that the State party cannot deny him judicial review on the basis that the appointment of judges, unlike that of civil servants, comes within the competence of the judicial rather than the administrative power, and at the same time benefit from the exemption of disputes concerning civil servants from the scope of article 6. Otherwise, he would be left without any remedy.

2.10 On 27 September 2001, the European Court declared the application inadmissible under article 35, paragraph 4, of the Convention, as it did not disclose any appearance of a violation of the rights and freedoms set out in the Convention.

The complaint

3.1 The author claims that the fact that the Supreme Court's decision not to hear his case was taken by the same judges who, in their capacity as members of the Supreme Council, had revoked his temporary appointment as District Court judge deprived him of his rights to a fair and public hearing before an impartial tribunal and to an effective remedy, in violation of article 14, paragraph 1, read alone and in conjunction with article 2, paragraph 3, of the Covenant.

3.2 On impartiality, the author recalls the Committee's jurisprudence[5] that judges must not harbour any preconceptions about the matter placed before them. The fact that neither the Attorney General, who usually represents the State in court proceedings, nor the Supreme Council as respondent filed an appearance before the Supreme Court illustrated that the 13 judges on the Supreme Court were judges in their own cause.

3.3 According to the author, the issue of impartiality is of such importance as a prerequisite for a fair trial that it should be considered before any other issue including that of jurisdiction. Instead of dismissing his case on grounds of jurisdiction, the Supreme Court judges should first have been replaced by another bench under the procedure provided for in article 153 (9) of the Constitution.

3.4 The author argues that the guarantees of article 14, paragraph 1, apply to all court proceedings, whether civil, criminal or administrative, as long as they involve a determination of one's rights and obligations in a suit at law.

3.5 With regard to article 2 of the Covenant, the author submits that the Supreme Court's failure to give effect to his rights under article 14, paragraph 1, deprived him of the only effective remedy available under Cypriot law.

State party's observations on admissibility and merits

4.1 On 2 December 2003, the State party challenged the admissibility and, subsidiarily, the merits of the communication, arguing that the author's claim under article 14, paragraph 1, is inadmissible *ratione materiae* under article 3 of the Optional Protocol and that, as a consequence, article 2 of the Covenant does not apply.

4.2 The State party recalls the Committee's jurisprudence[6] that the procedure of appointing judges does not come within the purview of a determination of rights and obligations in a suit of law within the meaning of article 14, paragraph 1, of the Covenant. In relation to the largely congruent provision of article 6, paragraph 1, of the European Convention, the European Commission[7] has decided that disputes concerning the judiciary, despite their independence from the executive branch, fall outside the scope of article 6. The European Court, since *Pellegrin v. France*,[8] has applied a "functional criterion" to exclude from the scope of article 6, paragraph 1, any disputes concerning the appointment, promotion or dismissal to or from posts involving participation in the exercise of powers conferred by public law.

4.3 The State party submits that the author's claim related to article 2 of the Covenant should also be dismissed, because that provision can only be invoked in conjunction with a substantive Covenant right.

4.4 On the merits, the State party argues that the author's allegations about the lack of impartiality of the Supreme Court judges and the denial of a fair hearing are merely conjectural, given that the Supreme Court (in whatever composition) was bound by its previous judgement in *Kourris v. The Supreme Council of Judicature*[9] to dismiss his complaint for want of jurisdiction under article 146 of the Constitution. The author's rights under articles 2 and 14, paragraph 1, of the Covenant had therefore not been violated in any event.

Author's comments

5.1 On 2 February 2004, the author commented on the State party's observations and amended the communication by claiming also a violation of article 25 (c) of the Covenant. He submits that his case relates to the procedural fairness of the Supreme Court proceedings rather than to the fairness of their outcome. These proceedings had to be distinguished from *Kazantzis v. Cyprus*, which related to the decision of the Supreme Council of Judicature itself, a non-judicial body, to reject the appointment of an applicant from outside the judiciary to the post of District Court judge.

5.2 The author considers that his case is similar to *Casanovas v. France*[10] and *Chira Vangas v. Peru*,[11] as it concerns the terms of his employment within the judiciary, conveying more favourable career prospects, salary and pension benefits in the event of his appointment to the post of District Court judge. He recalls that the concept of "suit at law" under article 14, paragraph 1, is based on the nature of the right in question rather than the status of one of the parties, and concludes that his claim under that article is admissible *ratione materiae*.

5.3 The author reiterates that the Supreme Court's lack of impartiality touched upon principles of natural justice and should therefore have been considered before any jurisdictional questions arising under domestic law. The Committee should take the view that article 14, paragraph 1, has been violated.

5.4 By reference to *Kazantzis v. Cyprus*, the author submits that the procedure for appointing judges falls within the scope of article 25 (c) of the Covenant. He contends that the revocation of his appointment to the post of District Court judge breached his right under that article to access, on general terms of equality, to public service.

5.5 The author claims that the dismissal of his complaint by the Supreme Court also deprived him of his right to access to an effective remedy, in violation of article 14, paragraph 1, and 25 (c) in conjunction with article 2 of the Covenant.

5.6 As a remedy, the author claims that the proceedings be revived and a differently composed Supreme Court deal first with the issue of impartiality of the 13 Supreme Court judges who dismissed his complaint. He also claims adequate compensation for the loss suffered in terms of career opportunities, salary and pension befits, as well as for his legal expenses.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 With regard to the author's claim under article 25 (c) of the Covenant, the Committee notes the absence of any information on comparable cases, in which candidates were appointed to the post of District Court judge, or on any prohibited grounds of discrimination, on the basis of which the author would have been denied access to that post. It therefore considers that the author has not substantiated his claim that he was denied access, on general terms of equality, to public service for purposes of admissibility. Consequently, this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.3 As to the author's claim under article 14, paragraph 1, the Committee observes that, in contrast to *Casanovas v. France* and *Chira Vargas v. Peru*, the present case concerns the revocation of an appointment to another post within the judiciary rather than the dismissal from public service. The Committee recalls that the concept of "suit at law" under article 14, paragraph 1, is based on the nature of the rights in question rather than the status of one of the parties.[12] It also recalls that that the procedure of appointing judges, albeit subject to the right in article 25 (c) to access to public service on general terms of equality, as well as the right in article 2, paragraph 3, to an effective remedy, does not as such come within the purview of a determination of rights and obligations in a suit at law within the meaning of article 14, paragraph 1.

6.4 The issue before the Committee is therefore whether the proceedings initiated by the author to challenge the revocation of his appointment to the post of District Court judge constituted a determination of his rights and obligations in a suit at law. The Committee recalls that the author chose not to resign from his post as Family Court judge to prevent a substantial reduction in his annual salary, exclusion of his years of service at the Family Court from the calculation of his pension benefits, as well as uncertainty of tenure. It notes that the author entirely preserved these acquired rights and considers that his claim concerning the loss of career prospects and possible increases in salary and pension benefits caused by the revocation of his appointment is merely hypothetical. Similarly, he has failed to substantiate any violation of his right under article 25 (c) to equal access to public service.[13] The author has therefore not substantiated that the proceedings initiated by him constituted a determination of his rights and obligations in a suit at law within the meaning of article 14, paragraph 1.

6.5 While the revocation of appointments within the judiciary must not necessarily be determined by a court or tribunal, the Committee recalls that whenever a judicial body is entrusted under national law with the task of deciding on such matters, it must respect the guarantee of equality of all persons before the courts and tribunals as enshrined in article 14, paragraph 1, and the principles of impartiality, fairness and equality of arms implicit in this guarantee.[14] However, the author has not rebutted the State party's argument that the Supreme Court's judgement in *Kourris v. The Supreme Council of Judicature* was a binding precedent to the effect that the Supreme Council's exercise of powers is not subject to judicial review and falls outside the Supreme Court's jurisdiction under article 146 of the Constitution. Accordingly, the Committee considers that the Supreme Court did not violate the guarantees of article 14, paragraph 1, when it declared itself incompetent to deal with the author's case, given that Cypriot law explicitly excluded the Court's jurisdiction to adjudicate the matter. The initiation of proceedings before a judicial body that manifestly lacks jurisdiction to deal with a matter cannot trigger the guarantees of article 14, paragraph 1. The Committee concludes that this part of the communication is therefore inadmissible *ratione materiae* under article 3 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under articles 2 and 3 of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] The Covenant and the Optional Protocol thereto entered into force for Cyprus respectively on 23 March 1976 and 15 July 1992.

[2] Article 153 (9) of the Constitution of Cyprus reads: "In the case of temporary absence or incapacity of the President of the High Court or of one of the Greek judges or of the Turkish judge thereof, the President of the Supreme Constitutional Court or the Greek judge of the Turkish judge thereof, respectively, shall act in his place during such temporary absence of incapacity. Provided that it is impracticable or inconvenient for the Greek or the Turkish judge of the Supreme Constitutional Court to act, the senior in office Greek or Turkish judge in the judicial service of the Republic shall so act respectively."

[3] The Court recalled that "[i]t is up to the court, which is legally competent under the law, to decide whether the subject matter of an application comes under its jurisdiction. This matter takes precedence over any other. Once it is considered that the court has jurisdiction to deal with the subject matter of an application, then the question of excluding judges who will exercise the court's jurisdiction is examined." Supreme Court of Cyprus, case No. 1547/2000, *Savvas Karatsis v. The Republic*, Judgement of 15 March 2001.

[4] The Supreme Court referred to its previous judgement in *Antonios Kourris v. The Supreme Council of Judicature* (1972) 3 CLR, 390.

[5] Communication No. 387/1989, *Karttunen v. Finland*, Views adopted on 5 November 1992, at para. 7.2.

[6] See communication No. 972/2001, *George Kazantzis v. Cyprus*, decisions on admissibility adopted on 7 August 2003, at para. 6.5.

[7] *X. v. Portugal* (1983) 32 DR, at p. 258.

[8] Application No. 28541/95, Judgement of 8 December 1999.

[9] See above, at footnote 4.

[10] Communication No. 441/1990, Views adopted on 19 July 1994.

[11] Communication No. 906/2000, Views adopted on 22 July 2002.

[12] Communication No. 112/1981, *Y.L. v. Canada*, decision on admissibility adopted on 8 April 1986, at para. 9.2; communication No. 441/1990, *Casanovas v. France*, at para. 5.2.

[13] See above, at para. 6.2.

[14] Cf. communication No. 1015/2001, *Perterer v. Austria*, Views adopted on 20 July 2004, at para. 9.2.

S. Communication No. 1185/2003, *van den Hemel v. The Netherlands* (Decision adopted on 25 July 2005, eighty-fourth session)*

Submitted by:	Johannes van den Hemel (represented by counsel, B.W.M. Zegers)
Alleged victim:	The author
State party:	The Netherlands
Date of communication:	12 June 2002 (initial submission)
Subject matter:	Independence of the judiciary
Procedural issues:	None
Substantive issues:	Right to fair trial
Articles of the Covenant:	14
Articles of the Optional Protocol	2

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 July 2005,

Adopts the following:

Decision on admissibility

1.1 The author of the communication is Johannes van den Hemel, a Dutch citizen. He claims to be a victim of a violation by the Netherlands of his rights under article 14 of the International Covenant on Civil and Political Rights. He is represented by counsel, Mr. B.W.M. Zegers.

1.2 On 15 August 2003, pursuant to the State party's submission on admissibility, the Special Rapporteur on new communications, acting on behalf of the Committee, decided that the admissibility and merits of the communication should be considered together.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Factual background

2.1 The author is an orthodontist living in the Netherlands. On 12 October 1989, he was involved in a car accident in which road signs used by road construction companies were damaged. The author himself suffered "material and non-material" damage and a 20 per cent loss of earning capacity.

2.2 The damage was covered by several insurance companies, including Royal Nederlands Verzekeing Maatschappij NV (Royal), which partially compensated the damage. The insurance company VVAA Schadeverzekeing-smattschappij (VVAA), with whom the author had third party insurance at the time of the accident, partially compensated the damage to Royal. The question of guilt regarding the cause of the car accident and the damaged road signs led to a dispute between the author and the insurance company Royal.

2.3 Royal filed a claim in the Utrecht Regional Court against the author and VVAA for compensation for the remaining damages. The author filed a counter claim. On 21 February 1996, the Utrecht Regional Court ordered the author to pay Royal 9,576.62 Dutch Guilders plus interest in the amount of 5,257.25 Dutch Guilders. The Utrecht Regional Court declared the author's counter claim inadmissible.

2.4 The author appealed the judgement to the Court of Appeal, which affirmed the judgement on 26 June 1997. Judges Van der Reep and Veger, who rendered judgement in the Court of Appeal case, also sit on the Utrecht Regional Court. The author refers to a report published in 1996 by the Scientific Research Judiciary Foundation, in which it is reported that a third judge, judge Cremers, who also rendered judgement in the author's Court of Appeal case, had decided in favour of the insurance company in all 26 appeal cases in which an insurance company was one of the parties.

2.5 On 26 September 1997, the author appealed the judgement to the Supreme Court. Two of the judges who considered this appeal, judges Herrman and Mijnssen, were at the time of the author's appeal, employed and remunerated by the Supervisory Board of the Insurance Sector (Raad van Toezicht Verzekeringen), which is financed by the League of Insurers (Verbond van Verzekeraars) of which Royal is a member. The Board is a disciplinary body that determines disputes between insurance companies and the insured.

2.6 On the basis that judges Herrman and Mijnssen of the Supreme Court would not be impartial, the author requested that they recuse themselves from the case. His application was heard by a different composition of the Supreme Court. Pursuant to a request from judges Herrman and Mijnssen, they were heard by the Supreme Court in the absence of the author. The author was heard in the presence of the two judges. According to the author, the judges stated that if their request were not granted by the court, they would "no longer cooperate with the hearing of the request with regard to the challenge". On 19 November 1999, the Supreme Court rejected the author's application and on 24 December 1999, rejected his appeal from the Court of Appeal.

2.7 The author states that judge Mijnssen had earlier been a colleague of judge Heemskerk at a University in Amsterdam. The latter, a judge on the Supreme Court, had considered and rejected the author's request to have Judge Mijnssen recuse himself from the case and had also heard and rejected the author's appeal.

2.8 According to the author, he has been unable to ascertain whether any of the judges of the Supreme Court or the Court of Appeal were shareholders of Royal, and accuses the Utrecht Regional Court of failing to comply with its obligations under article 44 of the Legal State Magistrates Act (Wet Rechtspositie Rechterlijke Ambtenaren), which requires Courts to hold a register in which the additional functions of magistrates are listed. He bases his argument on an October 2000 study undertaken by the Ministry of Justice, which concluded that a large number of judges refuse to publish their other functions or only partially publish them.

The complaint

3.1 The author claims that his hearing before the Court of Appeal was contrary to article 14 as two of the judges who rendered judgement in this appeal, also sit on the Utrecht Regional Court.

3.2 He claims that the relationship of the two judges of the Supreme Court with Royal, through their presence on the Supervisory Board, gives rise to "the appearance of a possible bias" in violation of the author's right to a fair hearing under article 14 of the Covenant.[1] He argues that a finding by these judges of the Supreme Court for the author in Royal's claim against him could have resulted in the termination of their membership on the Board and thus a loss of fees. The author states that the two judges indicated their interest in the dispute between the author and Royal through their refusal to withdraw from the case and their behaviour during the author's challenge to their hearing of the case. In addition, he argues that the failure to grant him a fair hearing was compounded by the "link" between Judge Mijnssen and Judge Heemskerk, as they had earlier been colleagues in a university in Amsterdam.

3.3 Lastly, he claims that relationships between Royal and the judges of the Utrecht Regional Court, the Court of the Appeal and the Supreme Court, violate his right to a fair trial under article 14 of the Covenant because these judges "could" be shareholders of Royal. He claims that as it "appeared" to him that the Utrecht Regional Court had failed to comply with article 44 of the Legal State Magistrates Act, his right to a fair trial had been violated, as he was unable to ascertain whether any of the judges were such shareholders.

The State party's submission on admissibility and merits and the author's comments thereon

4.1 On 4 August 2003, the State party contested the admissibility of part of the complaint. It submitted that the claim concerning the judges of the Court of Appeal is inadmissible for failure to exhaust domestic remedies. It argues that under articles 36 and 37, paragraph 1, of the Code of Civil Procedure, the author could have challenged the judges assigned to examine his case on "the grounds of facts and or circumstances which might prejudice judicial impartiality" and should be done "as soon as the person concerned has become familiar with these facts or circumstances". Had the author challenged the impartiality of one or more of the judges, the proceedings would have been suspended immediately. The challenge would have been heard by the full bench, excluding the challenged judges, at the earliest opportunity. Had the full-bench upheld the author's challenge, the case would subsequently have been heard by a court in which the challenged judge or judges took no part. It refers to the Committee's decision in *Perera v. Australia* and in *Triboulet v. France*[2] in this regard.

4.2 On 2 December 2003, the State party provided its submission on the merits, arguing that the part of the case which is not considered inadmissible for failure to exhaust domestic remedies is "manifestly ill-founded". As a preliminary remark, it noted that, on 14 November 2000, the European Court of Human Rights had found this case inadmissible, because it did "not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols". According to the State party, a finding by the Committee that there has been a violation in this case would be extremely difficult to reconcile with this conclusion.

4.3 As to the facts, the State party sets out the legislation governing challenges to judges on grounds of bias and the recusal of judges, including article 34 of the Code of Civil Procedure and 8:19 of the General Administrative Law Act (Algemene Wet Bestuursrecht), which states that a judge must recuse himself if there are facts or circumstances in a case that could be prejudicial to the court's impartiality. It submits that, under (old)[3] article 32 of the Code of Procedure, the court may determine, at the request of either the challenging party or the challenged judge, that either one or both parties will not be heard in each others' presence. The two judges of the Supreme Court availed themselves of this option and author's counsel stated expressly during the oral questioning at the public hearing of 4 October 1999 that he did not object.[4] After the president had granted the request, the author left the court. His counsel stated that he "thought it better that he should also leave the court". The State party adds that the judges concerned had said that they had no objection to the author's counsel being present while they were being heard. As to the claim that the judges stated that if their request were not granted by the court, they would "no longer [...] cooperate with the hearing of the request with regard to the challenge", the State party submits that this observation is completely groundless and is not supported by the documents in the case.

4.4 As to the claim that two of the judges considering his case before the Supreme Court were members of the Insurance Companies Supervisory Board, which is financed by the Dutch Association of Insurers, of which the other party in this case belonged, the State party refers to the Committee's definition of impartiality in Communication No. 387/1989, *Karttunen v. Finland*,[5] in which it was found that, "impartiality of the court implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties". In the State party's view, the author has not demonstrated that the judges in question harboured such preconceptions.

4.5 According to the State party, the author's observations fail to take into account the fact that the Supervisory Board's members are independent experts, and that the Supervisory Board is an independent disciplinary tribunal set up under private law. This Board provides, together with an Insurance Ombudsman, an alternative to legal proceedings. It sets out, in consultation with the insurer or agent involved, to find a solution to, or to pronounce an opinion on, an insurance dispute, but does not act in the place of the competent court. The Insurance Companies' Complaints Council is financed by a foundation of the same name, which was set up jointly by insurance companies and agents and the Dutch Consumers' Association, none of which, it is added, exercise any influence on, or have any power to decide, the way in which a case is dealt with.

4.6 The State party refers to the reasoning of the Supreme Court, stating that the mere fact that the Supervisory Board is financed in part, by way of the Insurance Companies' Complaints Council, and the Dutch Association of Insurers, the large membership of which includes the other party to the author's proceedings, and that the Supervisory Board's members receive a fee for their work, provides no justification, for the author's fear that the judges concerned lack impartiality.[6]

4.7 The State party argues that the Supervisory Board's members are appointed by the board of directors of the Dutch Association of Insurers, on the basis of nominations by the Association's management. Royal, as one of the many members of the Dutch Association of Insurers, was not in a position to exercise such considerable influence on the appointments, or reappointments, of Supervisory Board members, as suggested by the author. The State party explains that the Dutch Association of Insurers is only one of a large number of organizations, including the Consumers' Association, which is affiliated to the Insurance Companies' Complaints Council. Its members' independence is guaranteed explicitly in the Regulations. Furthermore, Royal, as a member of the Dutch Association of Insurers, is expressly subject to independent disciplinary jurisdiction. As to the allegation that the judges failure to ensure a positive outcome for Royal may have resulted in a failure to prolong their appointment thereby losing their fees, the State party highlights the fact that the author did not make this submission in the domestic proceedings.

4.8 The State party contests the fact that two of the judges in question, who had been professors in the law faculty of the Free University in 1990 and 1986, respectively, prior to their appointments to the Supreme Court, could be of any significance in the present communication. As to the allegation that some judges may be shareholders in Royal, the State party submits that under section 44 of the Judicial Officers (Legal Status) Act, judges are required to report any outside activities that they either already have or are contemplating. The Board administering the courts keeps a register of outside activities, which is open to inspection at the court. The outside activities of judges and deputy judges are also published on the internet. The State party argues that this claim is solely based on assumptions and that the author did not raise this point during the domestic proceedings. Thus, the domestic courts had no opportunity to make any finding thereon.

4.9 The State party submits that, should the Committee find the claim relating to allegations of bias by the judges of the Court of Appeal to be admissible, it should be noted that the author has not provided any evidence that the mere fact that judges working at the Court of Appeal also serve as deputy judges at the Utrecht Regional Court provides objective justification for fears of bias or constitutes sufficient grounds on which to conclude that there is an appearance of bias. It also states that the two judges in the Court of Appeal who are also deputy judges at the Utrecht Regional Court did not pronounce on the author's case at first instance.

5. On 2 February 2004, the author commented on the State party's response. He argues that since he did not know, at the time his appeal was pending, that two judges of the Court of Appeal were also sitting on the Utrecht Regional Court, the conclusion by the State party that domestic remedies have not been exhausted is invalid. He reiterates his view that as a large number of judges refuse to publish information on their additional functions, a litigant does not have reliable information on such functions for the purpose of challenging him and exhausting domestic remedies. In supplementary information provided on 28 May 2004, the author makes various allegations about the relationship between the judiciary and insurance companies generally.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the complaint is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that this matter was already considered by the European Court of Human Rights on 14 November 2000. However, it recalls its jurisprudence[7] that it is only where the same matter is being examined under another procedure of international investigation or settlement that the Committee has no competence to deal with a communication under article 5, paragraph 2 (a), of the Optional Protocol. Thus, article 5, paragraph 2 (a), does not bar the Committee from considering the present communication.

6.3 The Committee has noted the author's claim that the hearing of his case violated article 14 of the Covenant because: (a) two of the judges who rendered judgement in the Court of Appeal also sit as substitute judges on the Utrecht Regional Court; (b) the Supreme Court judges who considered his case were biased because of their possible links to Royal (the insurance company that filed a claim against the author), because of their positions on the Supervisory Board of the Dutch Association of Insurers; and (c) the judges who pronounced on his case "could" have been shareholders of Royal.

6.4 As to the first claim, the Committee notes that the author has adduced no evidence to the effect that the two judges of the Court of Appeal had in fact also sat on his case in the Regional Court of Utrecht, or participated in any way in the adjudication of his case at first instance. In this respect, the author has failed to substantiate his claim of bias, for purposes of admissibility, and the Committee therefore declares it inadmissible under article 2 of the Optional Protocol.

6.5 Inasmuch as the second claim is concerned (bias because of the Supreme Court judges' position on the National Insurers Association Supervisory Board), the Committee observes that the author challenged the two Supreme Court judges in question and requested that they recuse themselves. While expressing some doubts about the propriety of a system that allows judges to sit on a supervisory board established by a business association, the Committee notes that the Supreme Court heard the author's recusal challenge in a different composition, proceeded to a full hearing of the positions and the evidence advanced by the author and the judges in question, and in the end dismissed the challenge and subsequently, on 24 December 1999, also the substance of the appeal. The Committee recalls that it is generally for the courts of States parties to the Covenant to evaluate facts and evidence in a case, unless it can be ascertained that the evaluation was clearly arbitrary or amounted to a denial of justice.[8] Nothing in the material before the Committee suggests that the proceedings before the Supreme Court that resulted in the dismissal of the author's challenge on 19 November 1999 and of the substance of his appeal a month later suffered from such defects. Accordingly, this claim is inadmissible under article 2 of the Optional Protocol. The same applies with even more force to the author's claim, under article 14, that one of the Supreme Court judges who considered the author's challenge of the two Supreme Court judges had been a former colleague of one of these judges in the University of Amsterdam.

6.6 Finally, inasmuch as the author's final claim is concerned, the Committee notes that the contention that some of the judges who heard the author's appeal "might" have been shareholders of the insurance company which litigated against him (Royal), was not raised in the course of the domestic judicial proceedings. In this respect, accordingly, the Committee concludes that the author has failed to exhaust domestic remedies, as required by article 5, paragraph 2 (b), of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under articles 2 and 5, paragraph 2 (b), of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] In the communication, the author cites as applicable a decision of the House of Lords of 17 December 1998, ILM Vol. 38 (1999), which discusses the principle that a man may not be a judge in his own case as applied in a case where a judge is in fact a party to the litigation and where the behaviour of the judge gives rise to a suspicion that he is not impartial. The author additionally cites the High Court of Australia in *Webb and Hay v. The Queen* to demonstrate that the doctrine of disqualification applies where, as in the current case, a direct or indirect relationship gives rise to prejudice on the part of a judge.

[2] Communication No. 536/1993, decision adopted on 28 March 1995, para. 6.5, and communication No. 661/1995, decision adopted on 29 July 1997, para. 6.2.

[3] The Judiciary Act and the Code of Civil Procedure was amended on 1 January 2002. Thus, the numbering of the articles has changed.

[4] It refers to the relevant paragraph of the official report which reads as follows, "At the request of Mr. Mijnssen and Mr. Herrmann to be heard in Mr. van den Hemel's absence, Mr. Groen replied that his client had no objection to this", and "The President [of the special chamber hearing the challenge on grounds of bias - the Government stated that the request of Mr. Mijnssen and Mr. Hermann to be heard in Mr. van den Hemel's absence was granted, since the latter did not object".

[5] Views adopted on 23 October 19992, para. 7.2.

[6] "The mere fact that the Foundation is financed in the manner described in 2.7 and that the members of the Supervisory Board receive a fee, the amount of which is determined by the Foundation's Board, is insufficient having regard, inter alia, to the mandate [of the Supervisory Board] as defined in 2.5, to justify the conclusion that the petitioner's fear as described in 2.6 [that judges who are also members of the Supervisory Board lack impartiality in cases between insurers and non-insurers] is objectively justified."

[7] See communication No. 824/1998, *N.M. Nicolov v. Bulgaria*, decision adopted on 24 March 2000.

[8] See *Errol Simms v. Jamaica*, communication No. 541/1993, declared inadmissible 3 April 1995.

T. Communication No. 1188/2003, *Riedl-Riedenstein* v. Germany (Decision adopted on 2 November 2004, eighty-second session)*

Submitted by:	Riedl-Riedenstein, Viktor-Gottfried and Josseline; Scholtz, Maria (represented by counsel, Mr. Hans-Jochen Moser and Mrs. Sylvia Moser)
Alleged victim:	The authors
State party:	Germany
Date of communication:	11 June 2003 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 2 November 2004,

Adopts the following:

Decision on admissibility

1. The authors of the communication are Viktor-Gottfried and Josseline Riedl-Riedenstein (first and second authors), born in 1916 and in 1934 respectively, and Maria Scholtz (née Riedl-Riedenstein; third author). All are Austrian nationals. The authors claim to be victims of a violation by Germany[1] of articles 14, paragraph 1, and 26 of the Covenant. They are represented by counsel.

The facts as submitted by the authors

2.1 Prior to World War II, the family of the authors owned extensive property in Czechoslovakia, including stocks of German companies including *Daimler Benz* (worth 154.000 Reichsmark), *Dresdner Bank* (worth 142.000 Reichsmark) and *IG Farben Industrie AG* (worth 410.000 Reichsmark). These stocks were deposited at the family's secondary residence at Aich Castle. In September 1944, the first and third authors' father, in the first author's presence, decided to wrap the stocks in packages, on which he inscribed the third author's name. Pursuant to the *Benes decrees* of 1945, the family's properties in Czechoslovakia were confiscated, including Aich Castle, where the stocks were hidden in a hall cupboard. While the physical evidence of the stocks was confiscated, the Czechoslovak authorities did not attempt to redeem the value of the stocks.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen and Mr. Maxwell Yalden.

2.2 In 1948, the Deutsche Mark was introduced in the Federal Republic of Germany, and stocks in Reichsmark were reissued. As proof of ownership, the old stocks had to be submitted; failing this, ownership had to be established in other ways, e.g. by submission of bank statements, tax returns, etc. The Federal Republic of Germany acted as trustee for the owners and eventually took ownership of unclaimed stocks.

2.3 In 1965, the authors visited Aich Castle to collect information about their stocks for eventual submission to the German Federal Compensation Office, pursuant to the laws enacted between 1949 and 1964 on the procedure for examining and validating claims to securities lost or destroyed during or directly following the Second World War (*Wertpapierbereinigungsschlussgesetze*).

2.4 Between 1965 and 1976, the authors filed three claims for compensation with the Federal Compensation Office; these were dismissed in 1965, 1971 and 1981, respectively, for lack of sufficient proof of their ownership of the shares. The author's unsuccessfully appealed these decisions in separate proceedings, relating to each parcel of shares, before different courts.

2.5 Before 1990, the authors could not document their ownership of the stocks, since the papers kept at Aich Castle were inaccessible to them, and pertinent bank statements and tax returns had been destroyed in a fire at the family house in Vienna at the end of the War. Moreover, the Czech authorities had consistently refused to issue a certificate from the Central Bank, confirming the existence of their stocks.

2.6 Following the change of government in Czechoslovakia in 1990, the authors gradually obtained access to the necessary documentary evidence. On 19 April 1991, a new application for compensation of the *IG Farben* shares was submitted to the Securities Validation Chamber of the Frankfurt Regional Court, which dismissed the claim on 2 November 1992. On appeal, the Frankfurt Court of Appeal quashed that decision and referred the matter back to the Frankfurt Regional Court.

2.7 Following requests by the authors to defer a decision because new possibilities for securing fresh evidence from the Czech authorities had developed, the Securities Validation Chamber of the Frankfurt Regional Court decided, on 29 November 1999, that the authors had no case to claim compensation for *IG Farben* shares worth 410.000 Reichsmark, and set the amount in dispute at 1,644,000 DM. It considered that the requirements of section 15, paragraph 1, of the 1964 Act on the finalization of the validation of securities had not been met, as the authors had not justified their failure to apply for verification and registration of their rights to the stocks before the legally prescribed deadline on 31 December 1964. The Court rejected the authors' argument that they had been unable to obtain evidence in support of their claims prior to the visit to Aich Castle in 1965, given the reappearance, in 1962, of their former estate manager at Aich (now "Doubi"), who had detailed knowledge of the authors' assets, including their stocks. Neither the confiscation of Aich Castle nor the fire at their house in Vienna could justify their failure to meet the deadline, since they could reasonably have been expected to make enquiries with the bank in Karlsbad which had acted as intermediary for the purchase of the stocks or to inquire into the possible existence of dividend coupons, tax returns, or other evidence available with the Czech authorities.

2.8 Moreover, the authors had not plausibly shown their ownership of the stocks, since the mere inscription of the third author's name, in 1944, on the packages did not constitute a "delivery" of the stocks to the daughter, nor a substitute for such delivery, without any indication of the legal position of the bearer of the inscribed name, and because the father's power to act on behalf of his wife and daughter had not been established. Even if the first author, as the sole heir, would have been entitled to claim compensation for the stocks, he had failed to have his ownership title registered in the compensation proceedings before the expiry of the deadline on 30 June 1976, as prescribed by section 11, paragraph 1, of the 1975 Act to finalize the currency conversion. Lastly, the division and nominal value of the shares had not been specified.

2.9 On 2 October 2000, the Frankfurt Court of Appeal dismissed the authors' immediate appeal, in the absence of a legal error in the impugned decision of the Frankfurt Regional Court. With regard to the authors' argument that their deceased estate manager's knowledge of the existence of the stocks had suddenly become the central issue, the Court held that the mere fact that the authors' claims were previously dismissed on other grounds did not give rise to a bona fide expectation that their failure to meet the deadline for claiming validation of their stocks was considered to be justified.

2.10 Irrespective of the authors' argument that it was beyond their imagination that the estate manager would open the hall cupboard and find the stocks, the Court considered that the authors' failure to ask him about the destiny of the stocks amounted to a breach of their duty of care, given that he had continued to administer Aich Castle after the family's departure, that he had witnessed the confiscation of said properties by the Czechoslovakian authorities in 1945, and that the transcript of the confiscation, which he had handed over to the authors in 1962, did not mention the stocks. The Appeal Court therefore endorsed the Regional Court's finding that the authors had failed to show that they had made every reasonable effort to find evidence in support of their validation claim prior to their visit to Aich Castle in October 1965. By rejecting the authors' compensation claim on the ground of their unexcused failure to apply for validation of their stocks before the deadline on 31 December 1964, the Court did not examine the question of ownership of the stocks.

2.11 On 13 September 2001, the Federal Constitutional Court dismissed the authors' constitutional complaint, finding that the lower courts' decisions did not violate the constitutional prohibition of arbitrariness and that the question of whether a possible breach of article 6 of the European Convention, which required an oral hearing also in non-adversarial proceedings of a civil character, would at the same time constitute a violation of the German Basic Law, had no bearing on the case, since the authors did not claim that they could have introduced further evidence during an oral hearing which would have changed the lower courts' decisions.

2.12 On 1 February 1999, the authors submitted an application to the European Court of Human Rights, alleging that the length of compensation proceedings in relation to the *Dresdner Bank*, *Daimler Benz* and *IG Farben* shares violated article 6 of the European Convention, whereas the denial of any compensation for these shares breached their right to property (as enshrined in article 1 of Protocol No. 1 to the European Convention).

On 22 January 2002, the Court dismissed the authors' claims in respect of the proceedings concerning the *IG Farben* and *Dresdner Bank* shares for non-exhaustion of domestic remedies. With regard to the *Daimler Benz* shares, it rejected their complaint about the length of these proceedings as manifestly ill-founded and declared the application inadmissible *ratione materiae*, insofar as article 1 of Protocol No. 1 to the Convention was concerned, since the German courts' conclusion that the authors had not sufficiently established their property rights over the shares was neither arbitrary nor contrary to relevant provisions of national law.

The complaint

3.1 The authors, who limit the scope of their communication to the proceedings concerning the *IG Farben* shares, allege violations of their right under article 14, paragraph 1, to an impartial tribunal and of their right to equality and non-discrimination, under article 26, in conjunction with article 14, paragraph 1, of the Covenant, arguing that the German courts arbitrarily rejected their compensation claim by applying a stricter standard of proof to their case than to past compensation claims, which had frequently been granted in cases concerning confiscation of Jewish property. This discriminatory treatment could be linked to the courts' intention to protect the German treasury in times of severe economic constraints.

3.2 The authors submit that they exercised due diligence to document their claims, but were first denied information by the former Czechoslovak authorities and, when they finally obtained evidence that proved their ownership of the stocks, were denied compensation by the German courts, on the basis of their late filing of the claim and their failure to involve their former estate manager.

3.3 The authors submit that they exhausted domestic remedies and that the same matter is not being examined under another procedure of international investigation or settlement. Regarding the German reservation to article 5, paragraph 2 (a), they argue that their application to the European Court did not relate to the same substantive rights, since it concerned their right to property, which is not as such protected by the Covenant, and the length of the proceedings, rather than their right to equality of treatment and non-discrimination. Moreover, their claim regarding the *IG Farben* shares was not examined by the European Court at all.

The State party's observations on admissibility

4.1 On 12 August 2003, the State party contested the admissibility of the communication, arguing that the authors' claims are unsubstantiated, incompatible *ratione materiae* with the provisions of the Covenant, insofar as an isolated argument based on article 26 would be incompatible with the German reservation, and inadmissible for non-exhaustion of domestic remedies, to the extent that the authors failed to raise "the prohibition of arbitrariness under the aspect of unequal treatment compared to other claimants" in the Federal Constitutional Court.

4.2 The State party submits that the authors have not substantiated, for purposes of article 2 of the Optional Protocol, that their right to equality before the courts was violated, and in particular by reference to which comparable groups, or on the basis of which criteria, they had been discriminated against by the German courts' application of an allegedly more stringent standard of proof. Neither unidentified claimants who obtained compensation for lost securities nor claimants who obtained restitution for the confiscation of Jewish property could be deemed suitable groups of comparison, in the absence of any indication of the criteria on which the differential treatment was allegedly based, and since Jewish compensation claims for war-induced losses concerned an entirely different situation subject to distinct legislation.

Authors' comments

5.1 By submission of 4 November 2003, the authors argued that the German reservation has no bearing on their claims, since the issue before the Committee is a denial of equal treatment in a suit at law; their complaint is thus based on article 26, in conjunction with article 14, paragraph 1, rather than on article 26 alone. If the reservation was deemed to cover their claim, the authors request the Committee to examine whether it is compatible with the object and purpose of the Optional Protocol.

5.2 The authors submit that they sufficiently substantiated their claims, for purposes of admissibility, thereby reversing the burden of proof, in accordance with Committee jurisprudence . Accordingly, it was incumbent on the State party to specify what additional information it wished to obtain and to explain why other claimants had their ownership recognized, while the authors were always required to provide hard evidence inaccessible until the 1990s.

5.3 The authors reiterate that, once their claims had been made out, the German courts rejected them on entirely different grounds, namely that the authors should have tried to obtain an affidavit from someone who did not necessarily know of the stocks and who had not listed them in the inventory of Aich Castle. The State party should be estopped from raising this issue after the estate manager had died. Moreover, the State party itself could have assisted in obtaining the necessary information from the Czechoslovakian authorities.

5.4 Lastly, the authors submit that it would be unreasonable to require them to exhaust any further domestic remedies, after they had for decades exercised due diligence to obtain their rights in German courts.

6.1 On 29 September 2004, counsel forwarded further comments, submitting that, unlike Jewish and other victims of persecution on racial grounds, whose claims could be assessed under the Act on Compensation for Nazi Injustice (*Bundesentschädigungsgesetz*), the authors had been required to state the nominal value of their shares. When this information finally became available from the Czech authorities, their claim was rejected under the pretext that the same information could have been obtained from their former estate manager earlier. Given that the Compensation Act does not establish a requirement that each potential witness be contacted, the authors claim that they have been discriminated against in comparison to Jewish and other victims of racial persecution.

6.2 In support of their claim, the authors submit a decision dated 12 June 2002 of the Berlin Regional Revenue Office, granting a considerable amount of compensation to the joint heirs of a reportedly Jewish victim of confiscation of real estate in 1944. This compensation had been estimated in the absence of precise information on the real estate value to be compensated.

Issues and proceedings before the Committee

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

7.2 With regard to the authors' claim that the German courts' discriminated against them by applying a more stringent standard of proof to their case than to other past compensation claims, in particular claims concerning restitution of confiscated Jewish property, the Committee notes that the authors did not address this issue in their constitutional complaint dated 13 November 2000. It recalls that, in addition to ordinary judicial and administrative appeals, authors must also avail themselves of all other judicial remedies, including constitutional complaints, to meet the requirement of exhaustion of all available domestic remedies, insofar as such remedies appear to be effective in the given case and are de facto available to an author.[2] The Committee considers that the authors have not shown that addressing the alleged discriminatory application of a more stringent standard of proof to their claims before the Federal Constitutional Court would have been a futile remedy, merely because the lower courts had consistently applied such a standard of proof to their case. It therefore concludes that this part of the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol, since the authors have not exhausted all available domestic remedies in that respect.

7.3 The Committee notes the authors' claim that the German courts' dismissal of their compensation claim, in the proceedings concerning the *IG Farben* stocks, on the ground that they did not contact their former estate manager before the statutory deadline (31 December 1964) for filing a validation claim, was arbitrary and in violation of their rights under article 14, paragraph 1, in conjunction with article 26, of the Covenant, given the uncertainty about the latter's knowledge of the existence of the stocks. It recalls its constant jurisprudence that it is generally for the courts of States parties to the Covenant to review facts and evidence, or the application of domestic legislation, in a particular case, unless it can be shown that such evaluation or application was clearly arbitrary or amounted to a denial of justice, or that the court otherwise violated its obligation of independence and impartiality.[3] The Committee notes that the German courts based their finding that the authors had breached their duty of care, inter alia, on the assumption that it would have been the normal conduct for anyone who, as the first author, claimed to have known of the existence of the stocks since 1944, to inquire about their whereabouts upon receipt, in 1962, of a confiscation transcript that made no mention of them, as well as on their failure to inquire into the possible existence of other evidence of said stocks (e.g. by checking with the family's former bank in Karlsbad for proof of their purchase). It further notes that the Frankfurt Regional Court dismissed the authors' compensation claim not only on grounds of their unexcused failure to provide evidence of the *IG Farben* stocks before 31 December 1964, but also because they had not plausibly established their ownership of the stocks. In these circumstances, the Committee concludes that the authors have failed to substantiate, for purposes of admissibility, any arbitrariness on the part of the German courts; this part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

7.4 In the light of the foregoing, the Committee need not address the question of whether the State party's reservation regarding article 26 of the Covenant applies in the present case.

8. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under articles 2 and 5, paragraph 2 (b), of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the authors.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] The International Covenant on Civil and Political Rights and the Optional Protocol entered into force for the State party respectively on 23 March 1976 and 25 November 1993. Upon ratification of the Optional Protocol, the State party entered the following reservation: "The Federal Republic of Germany formulates a reservation concerning article 5 paragraph 2 (a) to the effect that the competence of the Committee shall not apply to communications (a) which have already been considered under another procedure of international investigation or settlement; or (b) by means of which a violation of rights is reprimanded having its origin in events occurring prior to the entry into force of the Optional Protocol for the Federal Republic of Germany; (c) by means of which a violation of article 26 of the [said Covenant] is reprimanded, if and insofar as the reprimanded violation refers to rights other than those guaranteed under the aforementioned Covenant."

[2] Communication No. 1003/2001, *P.L. v. Germany*, decision on admissibility adopted on 22 October 2003, at para. 6.5.

[3] Communication No. 886/1999, *Bondarenko v. Belarus*, Views adopted on 3 April 2003, at para. 9.3; communication No. 1138/2002, *Arenz et al. v. Germany*, decision on admissibility adopted on 24 March 2004, at para. 8.6.

U. Communication No. 1192/2003, *de Vos v. The Netherlands* (Decision adopted on 25 July 2005, eighty-fourth session)*

Submitted by:	Mr. M. de Vos (represented by counsel, Mr. M.W.C. Feteris)
Alleged victim:	The author
State party:	The Netherlands
Date of communication:	6 August 2002 (initial submission)
Subject matter:	Unequal taxation of commuters using company cars - Alleged absence of an effective remedy
Procedural issues:	Substantiation of claim by author - Admissibility *ratione materiae*
Substantive issues:	Right to equality before the law and equal protection of the law - Right to an effective remedy
Articles of the Covenant:	2 (3) and 26
Articles of the Optional Protocol:	2 and 3

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 July 2005,

Adopts the following:

Decision on admissibility

1. The author of the communication is Mr. M. de Vos, a Dutch national born in 1967. He claims to be a victim of violations by the Netherlands[1] of article 26 read alone and in conjunction with article 2, paragraph 3, of the Covenant. He is represented by counsel, Mr. M.W.C. Feteris.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Factual background

2.1 In 2000, the author, a tax consultant, used a company car made available to him by his employer, an international accounting and consulting firm, to commute between his home, which is located more than 30 kilometres away from his workplace, and his office in Amsterdam on at least three days a week. He also used the company car (with a catalogue price of 44,590 NLG) for private purposes for a distance exceeding 1,000 kilometres in 2000, subject to payment of an amount of 4,566 NLG to his employer.

2.2 Under article 42 of the Dutch Income Tax Law (1964), employees using a company car for private purposes must add 20 per cent of the catalogue price of the car to their taxable income. By Act of 4 July 1990, amending the Income Tax Act, this amount was increased by an additional 4 per cent of the catalogue price in cases where an employee commutes between his or her home and workplace on at least three days a week for a distance exceeding 30 kilometres (one way). At the same time, employees using a company car were exempted from any increase of the taxable income, if they could prove that their private use of the car does not exceed 1,000 kilometres per year.[2]

2.3 By decision of 15 July 1998 concerning tax year 1994, the Supreme Court found that the additional increase of the taxable income by 4 per cent of the catalogue price in cases where the private use of a company car exceeds 1,000 kilometres per year was contrary to article 26 of the Covenant. It considered that the extent of the private use did not constitute reasonable and objective criteria, which would justify discrimination between commuters, who use a company car for more than 1,000 kilometres per year and commuters who use it for less than 1,000 kilometres per year. However, it found that to make the relevant provision of the Income Tax Act inoperative would result in unequal treatment of employees without a company car, who frequently commute between their home and their workplace for distances exceeding 30 kilometres, and for whom the tax allowance for commuters had been capped for environmental purposes by the Act of 4 July 1990. The only way to ensure equal treatment of all employees frequently commuting for a distance exceeding 30 kilometres would be the non-application of all provisions on the capping of the tax allowance for commuters introduced by the Act. Such a consequence would, however, be disproportionate under article 26 of the Covenant. The Supreme Court concluded that it was for the legislator rather than the judiciary to remove this inequality, and that the fact that a new Income Tax Bill was soon to be submitted to Parliament showed that the legislator was in the process of resolving the problem.

2.4 Subsequently, the Government rejected the advice of the Council of State to bring Dutch tax legislation into conformity with article 26 of the Covenant by 1999, arguing that it was preferable to withhold any measures until the adoption of a general reform of the income tax legislation. On 1 January 2001, a new Income Tax Act entered into force, removing the disputed provisions of the Act of 4 July 2000.

2.5 On 11 April 2001, the tax inspector of 's Gravenhage assessed the author's tax declaration for 2000, adding an amount of 10,701 NLG (24 per cent of the company car's catalogue price of 44,590 NLG) to his taxable income and deducting the 4,566 NLG that the author had paid to his employer for the private use of the company car. The net addition to his taxable income was thus 6,135 NLG.

2.6 On 24 January 2001, the Supreme Court dismissed the complaint filed by another taxpayer, who claimed that the tax legislation should have been amended earlier. It considered that it was not unreasonable for the legislator to postpone the amendment of the legislation in order to resolve the issue as part of a general tax reform.

The complaint

3.1 The author claims that the fact that his taxation for the year 2000 was higher than that of other employees commuting with a company car on at least three days a week for a distance exceeding 30 kilometres (one way), merely because his private use of the car exceeded 1,000 kilometres, amounts to discrimination. The extent of his private use of the car could not justify his unequal treatment, given that other long-distance commuters using a company car equally polluted the environment, even if their private use of the car did not exceed 1,000 kilometres per year.

3.2 The author argues that the fact that another group of taxpayers, i.e. employees using other means than a company car to commute between their home and workplace on at least three days a week for a distance exceeding 30 kilometres (one way), had been adversely affected by the capping of the tax allowance for commuters, does not change the discriminatory nature of his taxation.

3.3 For the author, the combined effect of the application of the discriminatory provisions of the Act of 4 July 1990 to his case and of the Supreme Court's decision not to interfere in similar cases, despite its obligation under article 2, paragraph 1, to respect and to secure the rights recognized in the Covenant, amounts to a violation of article 26 of the Covenant.

3.4 The author adds that the absence of any remedy, other than a merely declaratory judgement of the Supreme Court which did not require the legislator or the executive to take any immediate measures to respect the Covenant, breached his right to an effective remedy under article 26, read in conjunction with article 2, paragraph 3, of the Covenant.

3.5 On exhaustion of domestic remedies, the author submits that a complaint to the Supreme Court would have been futile, in the light of its jurisprudence on similar cases, and that no other remedies are available to him under Dutch law.

3.6 The author claims compensation for the pecuniary damage suffered because of his discriminatory taxation. He argues that he should have been treated equally with the privileged group of taxpayers which had been exempted from the additional 4 per cent increase of the taxable income. The difference between the income tax paid by him in 2000 and the tax that he would have paid, had he been treated on an equal footing with the privileged group, should be reimbursed to him with statutory interests.

State party's observations on admissibility and merits and author's comments

4.1 On 23 October 2003, the State party submitted its observations on the admissibility and merits of the communication. While conceding that the author was not required to exhaust domestic remedies in the light of the Supreme Court's jurisprudence on similar cases, the State party argues that his claim under article 26 of the Covenant is inadmissible *ratione personae* under article 1 of the Optional Protocol[3] and that, in any event, his claims under articles 26 and 2, paragraph 3, of the Covenant are unfounded.

4.2 The State party submits that the Supreme Court's finding that the relevant provisions of the Act of 4 July 1990 were incompatible with article 26 of the Covenant, together with its instruction that the legislator amend these provisions, afforded the author adequate redress. Another option to remedy this incompatibility would have been to treat all taxpayers equally. However, the imposition of identical charges on commuters, whose private use of a company car did not exceed 1,000 kilometres per year, would only have resulted in higher taxation of this group, without improving the author's situation. The State party concludes that the author cannot claim to be a victim within the meaning of article 1 of the Optional Protocol and that his claim under article 26 is therefore inadmissible *ratione personae*.

4.3 Subsidiarily, the State party submits that the increase of the author's taxable income by an additional 4 per cent of the catalogue price of the company car did not violate article 26. The purpose of the Act of 4 July 1990 was to reduce commuter traffic, especially by car, for environmental reasons and in order to decongest road traffic in a densely populated country, the Netherlands. The legislative process leading to the adoption of the Act involved a careful examination of the available options to achieve this purpose. The proposed amendments were considered necessary to spread the financial burden equally among taxpayers, i.e. to ensure that employees frequently commuting by company car between their home and workplace for a distance exceeding 30 kilometres (one way) would make a financial sacrifice comparable to the capping of the tax allowance for commuters using their own car or public transport.

4.4 The State party argues that the small group of employees frequently commuting by company car for a distance exceeding 30 kilometres (one way), who bother to keep all records of the use of a company car to prove that their private use does not exceed 1,000 kilometres per year, is so insignificant that it cannot serve as a justification for abandoning the important social objective pursued by the imposition of charges on other long-distance commuters. Reasons of legal certainty militated against removing the privilege enjoyed by this group retroactively.

4.5 For the State party, accepting minor inequalities when elaborating a coherent body of tax legislation to strike a balance between the interests of different groups of taxpayers does not amount to a violation of article 26, if such inequalities only have negligible financial consequences for those concerned.

4.6 With regard to article 2, paragraph 3, the State party submits that objections to tax assessments can be lodged with the Dutch tax and customs administration, whose decisions are subject to appeal to the Court of Appeal and to further appeal on law to the Supreme Court. The author had been provided an effective remedy, as the alleged inequality of treatment had been ascertained in national proceedings and was later removed by the legislator. Insofar as the author claims that the Supreme Court's jurisprudence precluded him from recovering the amount by which his tax assessment exceeded the taxation of other commuters, whose private use of a company car did not exceed 1,000 kilometres per year, the State party argues that article 2, paragraph 3, does not guarantee a specific outcome of the remedy in place.

5.1 On 7 January 2004, the author commented on the State party's submission, rejecting the argument that one possibility to remove the inequalities from the Act of 4 July 1990, i.e. elimination of privileges enjoyed by a certain group of taxpayers, would not have changed the applicant's situation. He argues that, ultimately, any discrimination can be undone by downgrading the position of the group that is treated more favourably. This was, however, not intended by the Covenant and impracticable in cases where definite tax assessments could not be increased retroactively.

5.2 For the author, the mere finding of incompatibility of a law with article 26 cannot remove the underlying discrimination, if no effective redress is granted to victims of such discrimination. The subsequent removal of inequalities from the legislation through the tax reform of 1 January 2001 did not change the fact that the Covenant had been and continued to be violated in the meantime. By ratifying the Covenant the State party had undertaken to respect and ensure its guarantees with immediate effect.

5.3 While conceding that the reduction of commuter traffic was a legitimate policy objective, the author argues that this purpose cannot be pursued by discriminatory measures. He argues that the tax law reform of 2001 refutes the State party's argument that the inequalities in the Act of 4 July 1990 were necessary to elaborate a coherent body of tax legislation. Consistency with article 26 could have been ensured by increasing the taxable income of all commuters using a company car, who live more than 30 kilometres from their workplace, by 4 per cent of the car's catalogue price, irrespective of the extent of their private use of the car. It was irrelevant in this context whether such an increase could have been introduced retroactively and whether it would have had any beneficial effect for the author. The limited size of the privileged group could not justify the unequal treatment, given that under tax legislation, privileges are frequently granted to a small group of taxpayers only.

5.4 The author rejects that his discriminatory taxation was negligible, as the extra amount of tax paid by him totalled some US$ 450 in 2000. Unjustified distinctions were unacceptable, even if their financial impact was limited. Nor should distinctions in the field of tax law be accepted more easily than in other fields of legislation, bearing in mind the Committee's jurisprudence that article 26 prohibits discrimination in any field regulated and protected by public authorities.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 With regard to the author's claim that the increase of his taxable income by 4 per cent of the catalogue price of the company car used by him, merely because his private use of the car exceeded 1,000 kilometres, was discriminatory, in violation of article 26 of the Covenant, the Committee considers that the author has not substantiated how his different treatment was based on one of the prohibited grounds of discrimination enumerated in article 26, or on any comparable "other status" referred to in that article.[4] Consequently, this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.3 With regard to the alleged absence of an effective remedy, the Committee recalls that for purposes of the Optional Protocol, article 2 of the Covenant can only be invoked in conjunction with a substantive Covenant right. It notes that the author invoked article 2, paragraph 3, in conjunction with article 26 of the Covenant. However, his claim under article 26 being inadmissible because of the failure of the author to establish its applicability, it follows that his claim under article 26, read in conjunction with article 2, paragraph 3, is likewise inadmissible. The Committee therefore concludes that this part of the communication is inadmissible *ratione materiae* under article 3 of the Optional Protocol.

7. Accordingly, the Human Rights Committee decides:

(a) That the communication is inadmissible under articles 2 and 3 of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] The Covenant and the Optional Protocol thereto entered into force for the Netherlands on 11 March 1979.

[2] Pursuant to the then applicable section 6 of article 42 of the Income Tax Law, traffic between a commuter's home and workplace was not considered as private use.

[3] The author refers to the European Court's jurisprudence in *Auerbach v. The Netherlands*, application No. 45600/99, decision on admissibility adopted on 29 January 2002 and *Arends v. The Netherlands*, application No. 45618/99, decision on admissibility adopted on 29 January 2002.

[4] See communication No. 273/1988, *B.d.B. et al. v. The Netherlands*, decision on admissibility adopted on 30 March 1989, at para. 6.7.

V. Communication No. 1193/2003, *Teun Sanders v. The Netherlands* Decision adopted on 25 July 2005, eighty-fourth session)*

Submitted by:	Teun Sanders (represented by counsel, B.W.M. Zegers)
Alleged victim:	The author
State party:	The Netherlands
Date of communication:	12 June 2002 (initial submission)
Subject matter:	Independence of the judiciary: Practising lawyers appointed as substitute judges
Procedural issues:	None
Substantive issues:	Right to fair and impartial hearing
Articles of the Covenant:	14
Articles of the Optional Protocol:	2

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 July 2005,

Adopts the following:

Decision on admissibility

1.1 The author of the communication is Mr. Teun Sanders, a Dutch citizen. He claims to be a victim of a violation by the Netherlands under article 14 of the International Covenant on Civil and Political Rights. He is represented by counsel; Mr. B.W.M. Zegers.

1.2 On 28 August 2003, pursuant to the State party's submission on admissibility, the Special Rapporteur on new communications, acting on behalf of the Committee, decided that the admissibility of this communication should be considered separately from the merits.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Factual background

2.1 On 4 February 1997, the author lodged civil proceedings against the Dutch Touring Club (ANWB) and the Dutch Technical Institute (TNO), in which he requested the court to: (a) order the ANWB to rectify an article published in the ANWB magazine about the working and safety of a coupling stabilizer designed by the author; (b) prohibit the ANWB from distributing the article; order the ANWB and TNO to pay compensation for the damage he suffered; and (c) to order the ANWB and TNO to hand over the "report" mentioned in the summons.

2.2 On 10 February 1997, at the beginning of the court hearing, the author asked the "trial judge" to refer the case to another court, claiming that The Hague Regional Court could not be considered an independent and impartial tribunal. He argued that "a number of lawyers" working at the same law firm[1] as the lawyers representing ANWB and TNO also served as substitute judges on the Hague Regional Court and on the Court of Appeal. The judge rejected his request.

2.3 The author appealed to the Hague Court of Appeal and, at the beginning of the hearing, sought referral of the case to another Court of Appeal, for the same reason as in 2.2 above. On 22 September 1998, the Hague Court of Appeal declared the author's claim inadmissible as, under Dutch law, the decision not to refer the case to another court could not be appealed separately from the Court's ruling on the case itself. On 30 June 2000, his appeal to the Supreme Court was rejected.

The complaint

3.1 The author claims a violation of article 14 of the Covenant, as he was not afforded a "fair trial" before an independent and impartial tribunal. He claims that both the Hague Regional Court and Court of Appeal cannot be considered to be independent and impartial tribunals, as "a number of lawyers" working in the same firm as the lawyers representing ANWB and TNO also served as substitute judges on the same court, therefore creating a conflict of interest. He contends that the fact that the case was not referred to another Regional Court proved that the Hague Court of Appeal had an "interest" in passing judgement on the author's case.

3.2 The author adds that the lawyer for ANWB was also a professor at the Vrije University in Amsterdam, and that three other professors of the same university were substitute judges on The Hague Regional Court. He argues that the "trial judge" had been a member of the Disciplinary Council of The Hague bar association until 1996, together with Ms. Nouwen-Kronenberg, a judge on the Dordrecht (Municipal) Court and sister-in-law of Mr. Nouwen, a former manager of ANWB. When this fact was pointed out to the "trial judge", he answered that he was unaware of this fact and that it was no ground for him to rule himself out as a judge in the case.

3.3 Finally, the author claims that the institution per se of substitute judges, who always have additional functions besides their work as judges, violates article 14 of the Covenant, as it inevitably leads to conflicts of interest.

The State party's submission on admissibility and author's comments thereon

4.1 On 27 August 2003, the State party contested the admissibility of the communication on two grounds. Firstly, it submits that the author does not qualify as a "victim" within the meaning of article 1 of the Optional Protocol, as the President dealing with interim injunction proceedings (referred to by the author as the "trial judge") had no personal ties with the law firm of the defendant's lawyers. It recalls that the Optional Protocol is not intended for complaints couched in abstract terms about alleged shortcomings in national legislation or national legal practice. According to the State party, any challenge to a judge must be backed up with specific objections that demonstrate that the specific judge's impartiality was open to question, or in any case that objectively justifiable doubts exist concerning his/her impartiality or appearance of impartiality.

4.2 Secondly, the State party submits that the case falls outside the scope of the application of Covenant, as it concerns interim injunction proceedings before the President (referred to as the "trial judge" by the author). On the basis of article 254, paragraph 1, of the Code of Civil Procedure, a judge who hears applications for interim relief may grant an injunction "in all urgent cases in which an immediately enforceable injunction is required, having regard to the interests of the parties". Article 257 of the Code states, "immediately enforceable decisions shall not prejudice the principal action". The State party argues that the present case does not relate to the determination of a civil right, within the meaning of article 14, paragraph 1. It submits that the European Court of Human Rights reached the same conclusion on 29 May 2002, when it found the same case inadmissible, for being outside the scope of article 6 of the European Convention on Human Rights.

5.1 On 30 September 2004, the author commented on the State party's submission and reiterates that his claim does come within the scope of the Covenant, maintaining that it does relate to a civil right, i.e. the "right to a fair trial" and, that he has been a victim within the meaning of article 1 of the Optional Protocol. He concedes that the Regional Court judge who considered his case was not a substitute judge from the law firm in question but a full-time judge. However, this judge had "personal ties" with lawyers of the firm. He argues that in practice, judges consult or confer with other substitute judges who are also lawyers at the [DBB] law firm. He argues that the Covenant makes no distinction between summary proceedings and principal proceedings and the fact that the European Court of Human Rights found his claim inadmissible does not mean that the Committee should find likewise.

5.2 Finally, he refers to the consideration of an unrelated case before The Hague Regional Court on 21 June 2001, in respect of which the court held that because of the close connection between the judges of the Court and the law firm DBB, the applicant's request to have his case referred to another court was granted.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the complaint is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that this matter was already considered by the European Court of Human Rights on 29 May 2002. However, it recalls its jurisprudence[2] that it is only where the same matter is being examined under another procedure of international investigation or settlement that the Committee has no competence to deal with a communication under article 5, paragraph 2 (a), of the Optional Protocol. Thus, article 5, paragraph 2 (a), does not bar the Committee from considering the present communication.

6.3 The Committee notes the author's claim that the court was not independent and impartial as "a number of judges" on The Hague Regional Court and Court of Appeal were also practicing lawyers in the law firm against whom the author was taking legal action. It notes the State party's argument that the President of the court in which injunction proceedings were pending had no ties with the law firm in question and that the author conceded, in his own comments on the State party's observations, that the judge who considered his case was employed as a full-time judge and not a practising lawyer with the law firm in question. The Committee notes that the author has failed to provide any additional information which would substantiate his claim of lack of impartiality or lack of independence on the part of the judges.who examined his case. It therefore concludes that the author has failed to substantiate his claims for purposes of admissibility, under article 2 of the Optional Protocol, and that these claims are thus inadmissible.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] De Brauw Blackstone Westbroek Linklaters & Alliance (DBB)

[2] See communication No. 824/1998, *N.M. Nicolov v. Bulgaria*, decision adopted on 24 March 2000.

W. Communication No. 1204/2003, *Booteh v. The Netherlands* (Decision adopted on 30 March 2005, eighty-third session)*

Submitted by:	Ms. Sima Booteh (represented by counsel, Mr. Bogaers of Bos-Veterman)
Alleged victim:	The author
State party:	The Netherlands
Date of initial communication:	18 June 2002 (initial submission)
Subject matter:	Possible harm to author in the event of return to country of origin
Procedural issues:	None
Substantive issues:	Unfair asylum hearing
Articles of the Covenant	7, 9 and 16
Articles of the Optional Protocol	2

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 30 March 2005,

Adopts the following:

Decision on admissibility

1.1 The author of the communication is Mrs. Sima Booteh, an Iranian citizen, born on 12 July 1970, currently residing in the Netherlands. She claims to be a victim of violations of articles 7, 9 and 16, of the International Covenant on Civil and Political Rights, by the Netherlands. She is represented by counsel: Mr. Bogaers of Bos-Veterman, Van As & De Vries, lawyers, a Dutch law firm.

1.2 On 5 January 2004, the Special Rapporteur on new communications, on behalf of the Committee, ruled that the admissibility of this case should be considered separately from the merits.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Mr. Hipólito Solari Yrigoyen.

Factual background

2.1 The author is from a politically active family. Her father is alleged to have been a member of the Tudeh-party and was imprisoned for five years during the Shah's reign, and for two years when Ayatollah Khomeini was in power. Her brother and sister were also politically active and had to flee from Iran. They were granted refugee status in the Netherlands.

2.2 In 1989, the author started working for the Kavosh Institute in Teheran. The cultural board of the Institute was engaged in many political activities against the regime, such as the publication and distribution of pamphlets, forbidden books, bulletins, and magazines. The author participated in these activities by typing pamphlets and texts for magazines in the house of Dr. Reza Baharani, a member of the Iranian Writer's Council in Teheran. In April 1993, the Institute was raided by the police, but nothing was found. After this incident, the author decided to go back to her home town of Roudsar.

2.3 In Roudsar, the author and another woman published pamphlets and wrote letters about the situation of women in Iran, and encouraged other women to become involved in their activities. On 24 July 1994, the author and some other women were arrested by the police in the author's house. They were taken to Sepah prison, where the author was allegedly beaten until she fell unconscious. She was held in isolation for four weeks, interrogated day and night, and beaten. She was not given medication she needed to treat her asthma. She was held in this prison until 14 April 1995, when she was to be transferred to another prison. During her transfer, she managed to escape, as her father had bribed the guards; she left Iran on 10 March 1996.

2.4 On 11 March 1996, the author arrived in the Netherlands. On 28 March 1996, she applied for refugee status and a residence permit. On 1 August 1996, her application was denied by the State Secretary of Justice. On 10 September 1997, her objection against this decision was dismissed.

2.5 On 6 October 1997, the author appealed to the District Court of 's-Gravenhage. On 31 July 2000, the District Court dismissed her appeal, considering that she had failed to show a fear of persecution within the meaning of refugee law. The decision was based on the finding that the author's account was vague, contradictory and/or inconsistent, and was not supported by the evidence presented by her in court.

2.6 On 30 July 2002, in a further communication to the Committee, the author argued that the judgement of 31 July 2000 was final and that she could be expelled at any moment. However, on 11 August 2003, she informed the Committee through her counsel that, although she had no right to stay in the Netherlands, no deportation order had, in fact, been issued. Indeed, she stated that "the Dutch authorities don't follow an active policy of refoulement. The Netherlands let people bleed to death".

The complaint

3.1 The author claims to be a victim of a violation of articles 7 and 9 of the Covenant, since, on account of her previous detention in Iran on the basis of her political activities, she would be in imminent danger of being arrested and detained if returned to Iran, where she would be subjected to torture or cruel, inhuman or degrading treatment or punishment. She alleges that she is still being sought by the Iranian authorities.

3.2 In respect of the procedure before the Dutch immigration authorities, the author complains that the interpreter was impolite and deliberately incorrectly translated a number of her statements. The immigration officer allegedly could not concentrate properly because of a pain in his knee, and the first lawyer who represented her did not give her enough time to tell her full story, while the second one met her too briefly. She claims that no translator was present during the District Court hearing of 22 July 1999 and that the contradictions the court found in her story are attributable to problems of interpretation. She challenges the court's finding that a certain document by the Iranian authorities was not authentic.

3.3 Lastly, the author claims that her situation in the Netherlands violates article 16 of the Covenant, given that she is not allowed to stay in the country nor is she expelled. Thus, she is treated de facto as a non-person before the law.

The State party's submission on admissibility and the author's comments thereon

4.1 On 4 December 2003, the State party submitted its observations on the admissibility of the communication. As to the author's claim under article 7, the State party submits that the author makes a number of unspecified critical comments about the Dutch asylum proceedings. In this context, it submits that in domestic proceedings, the author failed to submit specific objections against the nature of the asylum proceedings, thereby denying the competent authorities the opportunity to respond to those objections. It argues that the author has not exhausted domestic remedies. Secondly, it observes that the right to file an individual complaint is not intended to provide an opportunity for complaints *in abstracto* concerning national legislation and practice.

4.2 As to the allegation of a violation of article 9, on the basis that the author's detention in Iran for nine months was unlawful, the State party submits that this detention and any alleged violation connected with it, did not take place within the jurisdiction of the Netherlands and is not therefore attributable to the State party.

5.1 On 23 December 2003, the author responded to the State party's observations on admissibility. She challenged its view that the complaint amounts to an *actio popularis* and reiterates her claim that her expulsion to Iran would expose her to a real risk of violation of her rights under the Covenant, and that in assessing her complaint the Dutch authorities unfairly concluded that her claims were insufficiently substantiated. In this regard, she requests the Committee to read the analysis of the asylum procedure and background to her case.

5.2 On the issue of exhaustion of domestic remedies, the author states that no further remedies are available. She refers to a statement in a letter to her lawyer from the Ministry of Justice, which states that "Now the decision is definite, I don't see any room to reconsider your case".

5.3 Concerning the alleged violation of article 9, the author claims that the State party has deliberately misinterpreted her claim, that because she was already a victim of unlawful detention in Iran, she has serious grounds to fear that such detention "or worse" will fall upon her if forcibly returned to Iran. In this sense, she claims that the State party would be responsible for a repetition of such unlawful detention.

5.4 The author provides a copy of a letter, dated 19 January 2004, from Amnesty International, which states that if the author is removed to Iran, she would be exposed to a real risk of a violation of her rights under articles 7 and 9 of the Covenant, and highlights alleged inadequacies in the asylum procedure in the Netherlands, including alleged inadequacies in how the author's own case was decided.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 As to the claim that the State party would violate articles 7 and 9 if it were to return the author to Iran knowing full well that it is likely that she would be subjected to arbitrary detention or other unlawful treatment upon her arrival, the Committee notes that the author does not expect to be forcibly returned to Iran. It further notes that apart from asking it to review the Dutch asylum procedure, the author's claims relate to procedural irregularities (see paragraph 3.2), which the domestic courts have not had an opportunity to address. The Committee therefore considers this claim is inadmissible as unsubstantiated within the meaning of article 2 of the Optional Protocol.

6.3 As to the alleged violation of article 16, the Committee finds that the author has not shown how the State party's refusal to grant her a residence permit while at the same time failing to deport her, amounts to a violation of article 16. The Committee therefore considers this claim inadmissible under article 2 of the Optional Protocol.

7. Accordingly, the Committee decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

(b) That this decision be transmitted to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

X. Communication No. 1210/2003, *Damianos v. Cyprus* (Decision adopted on 25 July 2005, eighty-fourth session)*

Submitted by:	George Damianos (represented by counsel, Mr. Achilleas Demetriades)
Alleged victim:	The author
State party	Cyprus
Date of communication:	12 June 2001 (initial submission)
Subject matter:	Unequal treatment of employee following restructuring of a public service entity
Procedural issues:	None
Substantive issues:	Right to equality and freedom from discrimination; access to public service; enforcement of a remedy
Articles of the Covenant:	19, 25 (c), 26 and 2
Articles of the Optional Protocol:	2

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 July 2005,

Adopts the following:

Decision on admissibility

1. The author of the communication is George Damianos, a Cypriot national. He claims to be a victim of violations by Cyprus of his rights under articles 19, 25, (c) and 26 read alone and in conjunction with article 2, of the International Covenant on Civil and Political Rights. He is represented by counsel, Achilleas Demetriades.

Factual background

2.1 On 16 April 1980, the author was appointed as "Programme Officer" in the Radio Programme division of the Cyprus Broadcasting Corporation (CBC), which is part of the public service,[1] at the salary scale 6/7 (maximum salary of £3,765 Cyprus pounds per annum). In September 1982, a collective agreement was signed between the CBC and the Trade Unions, according to which posts in the CBC were restructured. In April 1983, pursuant to the restructuring, the post of "Programme Officer" was abolished and seven new posts were created bearing the following titles: Programme Officer A Scale A 10 (£4,396 Cyprus pounds per annum); Programme Officer B Scale A 8/9 (£3,909 Cyprus pounds per annum); and Programme Officer C Scale A 4/7 (£3,150 Cyprus pounds per annum). The author and the other Programme Officers were appointed, retrospectively from 1 January 1981, to the post of Programme Officer A with the addition in brackets of (Personal title) in the salary Scale 8/9. These new posts did not exist in the restructured establishment. The CBC stated that it intended to advertise the new posts of Programme Officer A Scale A 10, to which the author and the other Programme Officers were invited to apply.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Sir Nigel Rodley Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

2.2 The author and his colleagues challenged the restructuring in an application to the Supreme Court. On 3 May 1985, the Supreme Court, having considered that the collective agreement was not in itself a sufficient legal basis on which the restructuring could be based, found that, although there was no financial detriment to the applicants after the restructuring, there had been a diminution of their status within the organization. Thus, the Court decided, they were entitled to be appointed to an existing post under the new structure, with duties and responsibilities corresponding to their previous position and seniority. The decision by the CBC was annulled.[2] The CBC appealed the decision, but later abandoned the appeal.

2.3 On 28 November 1985, the CBC decided that the author (as well as other employees in the music division) would be reinstated in his old post, that of Programme Officer, with his original responsibilities and on salary scale 8/9, instead of the old scale 6/7. The author notes that he was again placed against a post that did not exist under the new structure. On 30 November 1985, some of the author's colleagues, but not the author himself, submitted an application to the Supreme Court for the committal of the Director General and the Board of Directors of CBC for disobeying the decision of the Court of 3 May 1985. The Court rejected the application. The applicants subsequently reached a settlement with the CBC, to which the author was not a party.

2.4 Subsequently, the author applied to the Supreme Court contesting the legality of the CBC's decision of 28 November 1985, claiming that it was contrary to the Supreme Court's decision of 3 May 1985, and that his reinstatement in his old position of Programme Officer, which had been abolished by the restructuring, was wrong, as his position no longer existed. In his view, the new post under the new structure, which corresponded to the duties and responsibilities of his old post was Programme Officer A Scale A 10. On 13 June 1987, the Supreme Court dismissed his claim, holding that he had been correctly reinstated in his old post, and noted that he was paid at a higher salary scale. The Court disagreed with the conclusions of the Supreme Court decision of 3 May 1985, arguing that, given that the Court had found that the collective agreement is not a sufficient legal basis on which the restructuring could be validly founded, the author's original post of Programme Officer could not have been abolished by the restructuring. The CBC was thus correct in placing the author on his old post.[3]

2.5 On 13 June 1987, the author appealed the Supreme Court's decision.[4] During the hearing on 23 November 1990, the CBC agreed to reconsider the matter and the appeal was abandoned. On 12 July 1991, the CBC reviewed the author's case and rejected his request for appointment to the post of Programme Officer A Scale A 10 but decided that he should remain on his old position of Programme Officer on the higher scale 8/9, as decided on 28 November 1985. Following this decision, the author appealed his case to the Supreme Court, claiming that the CBC had discriminated against him in applying the collective agreement partially and selectively in relation to some employees but not to him. On 26 March 1999,[5] the Supreme Court dismissed his claim of unlawful discrimination, holding that the author had failed to prove that his situation was similar to the cases in which the collective agreement had been applied. A general claim that the agreement was only applied in relation to some employees was not sufficient. Thus, the author had not failed to discharge the required burden of proof.

2.6 On 19 December 1991, the CBC's decision was upheld by a decision of the Ministry of Internal Affairs, who stated that if his claim were to be accepted he would be put in a better position than his colleagues who had reached a settlement with the CBC. On 30 March 1992, the author was offered a permanent appointment as Programme Officer A Scale A 10. On 13 April 1992, he accepted this offer.

The complaint

3.1 The author claims that having been placed on non-existing posts three times since 1983, (in April 1983, 28 November 1985 (old post) and 12 July 1991 (decision to remain on old post) he was treated unequally and in a discriminatory manner by the CBC in relation to the application of the collective agreement, which was applied to other employees but not to himself. The CBC's decisions to place him on these posts were contrary to the Supreme Court decision of 3 May 1985, and the author believes that he was discriminated against on the basis of his opinions.

3.2 As a consequence of this treatment, he claims that his employment status was affected negatively. He agues that if he had been appointed to the new post of Programme Officer A Scale A 10, when the restructuring took place (1983) rather than nearly 10 years later, he would be in a more senior position than the one he holds at the time of submission of the communication. Indeed, he currently remains in the position he should have been in if the Supreme Court judgement of 3 May 1985 had been applied i.e. Programme Officer A Scale A 10. In addition, he states that he suffered a reduction in his salary as well as pension entitlement reductions, and the proceedings themselves caused him a financial loss.

3.3 In addition, the author claims that the State party's failure to ensure his right to equal and non-discriminatory treatment and to provide him with an effective remedy violates article 2 of the Covenant. He refers to the failure of the domestic Courts to uphold and enforce the decision of the Supreme Court of 3 May 1985.

State party response on admissibility and merits and author's comments thereon

4. In its submission of 26 April 2004, the State party endorses the approach of the Supreme Court judgement of 26 March 1999, which stated inter alia, "the burden of proof of any discriminatory or unequal treatment is on the appellant. In order to establish his allegation, the appellant should have proved that his case was the same as that of the cases in respect of which the relevant agreement was applied. A general allegation for application of the agreement in respect of certain employees is not enough. Consequently, the appellant has failed to discharge the burden of proof and therefore the relevant ground of annulment is dismissed". In the State party's view, the author's claim is therefore manifestly ill-founded.

5.1 On 22 July 2004, the author reiterated his previous arguments and added new claims under articles 25, paragraph (c), and 19 of the Covenant. On article 25 (c), he claims that this provision requires equal treatment, not only in relation to access to such employment but throughout the period in which an employee forms part of the public service of his country. He claims that his treatment by the CBC constitutes harassment that threatened the continuity of his public service position. As to the latter provision, the author claims that the expression of his opinions with regard to the inadequate administration of the CBC and the ensuing unequal treatment he was subjected to resulted in his exclusion from the normal scales of promotion that applied to the rest of his colleagues. He reiterates his claim under article 2, read alone and/or in conjunction with articles 26, 25 (c), and 19, that the State party failed to ensure the application of his rights in an equal manner and without distinction of any kind, and failed to provide him with an effective remedy in relation to the violation of articles 26, 25 (c), and 19. He also claims a stand-alone violation of article 2, paragraph 3 (c), as the State party failed to give effect to a judicial decision of the State party, namely the decision of the Supreme Court of 3 May 1985. This decision constitutes a final decision of the national courts of the State party, which has not been enforced.

5.2 As to the State party's argument that the burden of proof was on the author to prove that his position was the same as those of the other employees, the author claims that once a prima facie case of discrimination has been made out by him, it is for the State party to prove that there has been no discrimination.

5.3 On the facts, the author recalls that he was the only employee left in an ambiguous position until he was finally appointed to an existing post in 1992. He claims that on 18 August 1983, soon after the conclusion of the collective agreement, there were 13 employees with the same salary scale as himself, namely 8/9, and that the CBC applied the collective agreement selectively, resulting in the author being the last of these employees to be appointed to an existing post, almost 10 years later. The State party's authorities, by failing to examine the reasons why he was treated less favourably, acquiesced in this decision. The author claims that the denial of the authorities to appoint him to an existing post until 1992 was part of the victimization and harassment against him, due to his attempts to disclose the inadequate administration of the CBC through complaints to internal and external bodies, and his initiation of legal proceedings.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the complaint is admissible under the Optional Protocol to the Covenant.

6.2 As to the claim that the State party violated the author's rights under article 19, the Committee considers that the author has failed to substantiate this claim, for purposes of admissibility. Thus, the Committee considers this claim inadmissible under article 2 of the Optional Protocol.

6.3 As to the author's claim of unequal treatment and discrimination, under articles 25 (c) and 26 (read together with article 2), of the Covenant, the Committee notes that these issues and claims were addressed by the Supreme Court of Cyprus in its judgement of 26 March 1999. It specifically examined the author's argument that by going ahead with the restructuring for several of his colleagues but not for him, CBC had discriminated against him. It concluded that the author did not discharge the required burden of proof for the discriminatory nature of his treatment by the CBC. The Committee recalls its jurisprudence that it is generally for the courts of States parties to the Covenant to evaluate facts and evidence in a particular case, unless it can be ascertained that the evaluation was clearly arbitrary or amounted to a denial of justice.[6] Nothing in the file suggests that the proceedings before the Supreme Court which resulted in the judgement of 26 March 1999 suffered from such defects. The Committee accordingly considers this part of the communication to be inadmissible under article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

(b) That this decision be transmitted to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] According to the author, it is under the auspices of the Ministry of Internal Affairs.

[2] The Supreme Court decision notes that "As a result of the re-structuring of the establishment the applicants were entitled by virtue of their vested rights in the previous posts, to be emplaced to an existent organic post under the new structure, with corresponding duties and responsibilities. In the circumstances of the present case for the reasons I have explained, there has been a diminution of the status of the applicants as they have not been emplaced to an existent organic post corresponding to the one previously possessed by them. For these reasons this recourse succeeds and the sub judice decision is annulled."

[3] The Court acknowledged that seven Programme Officers were, in accordance with the restructuring, placed in the post of Programme Officer A, Scale A 10, but that the applicants were not challenging this, only their "nonemplacement" in post of Programme Officer A Scale A 10, and their alleged wrongful emplacement in their old post of Programme Officer, which they say was abolished as a result of the restructuring.

[4] He does not say to where he appealed it.

[5] An earlier application to the Supreme Court on the same grounds was dismissed on 10 September 1993 "for lack of competence to render judgement due to the existence of contradictory jurisprudence".

[6] See *Errol Simms v. Jamaica*, communication No. 541/1993, declared inadmissible on 3 April 1995.

Y. Communication No. 1220/2002, *Hoffman v. Canada* (Decision adopted on 25 July 2005, eighty-fourth session)*

Submitted by:	Walter Hoffman and Gwen Simpson (represented by counsel, Brent D. Tyler)
Alleged victim:	The authors
State party:	Canada
Date of communication:	4 October 2003 (initial submission)
Subject matter:	Whether statutory requirement for "marked predominance" of French for public signage in Québec is consistent with the Covenant
Procedural issues:	Exhaustion of domestic remedies
Substantive issues:	Discrimination on the basis of language - freedom of expression - minority rights - fair trial - effective remedy
Articles of the Covenant:	2, paragraphs 1, 2 and 3; 14; 19, paragraph 2; 26 and 27
Articles of the Optional Protocol:	5, paragraph 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 July 2005,

Adopts the following:

Decision on admissibility

1.1 The authors of the communication, initially dated 4 October 2003, are Walter Hoffman and Gwen Simpson, born 24 March 1935 and 2 February 1945, respectively. They claim to be victims of violations by Canada of article 2, paragraphs 1, 2 and 3; article 14; article 19, paragraph 2; article 26 and article 27. They are represented by counsel.

1.2 On 26 April 2004, the Committee's (then) Special Rapporteur on new communications decided to separate the consideration of the admissibility and merits of the communication.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Sir Nigel Rodley Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Factual background

2.1 The authors, English speakers, are the two shareholders and directors of a corporation registered as "Les Enterprises W.F.H. Ltée", doing business in Ville de Lac Brome, Quebéc, under the firm names "The Lyon and the Walrus" and "La Lionne et Le Morse".
On July 10 1997, the authors displayed a sign outside their business.

One side of the sign read:	And on the other side:
"LA LIONNE ET LE MORSE	**"LYON AND THE WALRUS**
Antiquités	Antiquities
Hot Tubs & Saunas	Hot Tubs & Saunas
Encadrement Gifts"	Cadeaux"

The sign was thus bilingual, except for the words "Hot Tubs" found on both sides. All the other words covered the same amount of space in each language and had equal size letters.

2.2 The authors' corporation was charged with non-compliance with sections 58[1] and 205[2] of the Charter of the French Language, which require the "marked predominance" of French on outdoor signs. Although admitting the facts constituting the offence, the authors claimed in their defence that these provisions were invalid, because they infringed their right to freedom of commercial expression and right to equality both under the Canadian Charter of Rights and Freedoms and the Québec Charter of Human Rights and Freedoms.

2.3 On 20 October 1999, the Court of Québec acquitted the authors' corporation, accepting their defence that the relevant provisions of the Charter of the French Language were invalid. The Court considered that the provisions violated the right to freedom of expression protected both in the Canadian Charter of Rights and Freedoms (section 2 (b)) and the Québec Charter of Rights and Freedoms (section 3), and that the Attorney-General of Québec had not demonstrated the restrictions to be reasonable.

2.4 On appeal, the Superior Court of the District of Bedford, on 13 April 2000, reversed the decision of the lower court. Through counsel, the authors' corporation, believing that the burden of justification lay with the Attorney-General, declined the Court's invitation to provide comprehensive evidence of why the restrictions of section 58 were not justified. The Superior Court considered, on its view of relevant Supreme Court precedent of 1988,[3] that it was up to the challenging party to demonstrate that section 58's limitations on freedom of expression were not justified. Specifically, it would have to be shown that the factors shown by the Supreme Court in the 1988 cases to justify a "marked predominance" requirement for French no longer applied.[4] The authors' corporation not having done so, it was accordingly convicted and fined $500.

2.5 On 29 March 2001, the Court of Appeal rejected a motion of counsel for the authors' corporation to file new evidence as to the linguistic profile in Québec, considering that the evidence did not relate to the dispute as defined by the authors' corporation in the lower courts and on appeal. The Court recorded that the Superior Court had specifically invited the parties to submit new evidence, whose clear position was to proceed on the existing record. Furthermore, the Superior Court had considered the parties' positions unequivocal and considered its equitable obligation to ensure neither party was taken by surprise to be fulfilled.

2.6 On 24 October 2001, the Québec Court of Appeal dismissed the substantive appeals of the authors' corporation. The Court of Appeal considered that the formulation of section 58 in 1993 had reflected previous comments by the Supreme Court of Canada that requiring a "marked predominance" of French would be constitutionally acceptable in view of Québec's linguistic profile. The onus thus fell on the authors to show that there was no longer sufficient justification for what had at that point been considered acceptable restrictions. In the Court's view, the authors' arguments linguistic duality, multiculturalism, federalism, democracy, constitutionalism and the rule of law and the protection of minorities did not discharge that burden. The Court also distinguished the Committee's Views of violation in *Ballantyne et al. v. Canada*, noting that in that case a requirement for exclusive use of French had been at issue.

2.7 The application of the authors' corporation for special leave to appeal to the Supreme Court of Canada was dismissed on 12 December 2002.

The complaint

3.1 The authors note, at the outset, that Québec's language laws have been considered by the Committee in *Ballantyne et al. v. Canada*,[5] *McIntyre v. Canada*[6] and *Singer v. Canada*.[7] In *Ballantyne et al.*, the Committee found that provisions of the Charter of the French Language which, at that time, prohibited advertising in English, violated article 19, paragraph 2, of the Covenant, but not articles 26 and 27. In *Singer*, the Committee found that amended provisions, which required external advertising to be in French, but which allowed inside advertising in other languages in some circumstances, constituted a violation of article 19, paragraph 2, in the case (concerning external signage). The present "marked predominance" provisions which the authors challenge came into effect after the *Singer* case was registered, but prior to the Committee's Views. The Committee there noted that it had not been asked to consider whether the present provisions complied with the Covenant, but concluded that they afforded the author an effective remedy in the particular circumstances of his case.

3.2 The authors contend that their right to freedom of expression under article 19, paragraph 2, is infringed by the prescription of any particular language in private commercial activity. They claim that restrictions on use of language are not warranted by the "necessity" qualifier in article 19, paragraph 3, and that the Supreme Court of Canada was wrong to uphold any language restrictions as reasonable and warranted. They also claim that the requirement to use "markedly predominant" French in advertising violates their right to equality under article 2, paragraph 1; that it violates their right to freedom from discrimination on the basis of language under article 26; and that it violates their rights as members of a national minority (the English speaking minority in Québec) in accordance with article 27.

3.3 In relation to article 14, the authors claim that, on appeal, the court found the authors had the onus of proving that the special legislative measures to protect the French language were not warranted and justified under the Canadian Charter. The authors allege that they offered to adduce evidence to the appeal court, in order to discharge this burden of proof (they had not adduced any below, because the trial judge found that the State carried this onus, and had not discharged it). The authors contend that the appeal court wrongly believed they did not want to adduce any evidence.

3.4 Finally, the authors argue that the State party has failed to implement its Covenant obligations, in breach of article 2, paragraphs 2 and 3, by the insufficient coverage in domestic law of Covenant obligations and the failure of the courts in the present case appropriately to assess the complaint from a Covenant perspective.

State party's submissions on admissibility of the communication

4.1 By submissions of 6 April 2004, the State party contested the admissibility of the communication. Firstly, the State party argues that a corporation does not enjoy the rights protected by the Covenant. It contends that the corporation "Les Enterprises W.F.H. Ltée" was the entity prosecuted and convicted for breach of the Charter of the French Language. In Canadian law, a corporation is separate from its shareholders, with legal personality. Creditors of a corporation cannot recover debts from a shareholder. Corporations are also differently taxed from natural persons. The authors, therefore, cannot domestically claim to be separate persons and benefit from special rules applying to corporations but, before the Committee, lift the corporate veil and claim individual rights. The State party thus relies on the Committee's jurisprudence that where an author of the communication was a corporation,[8] or where the victim of alleged violations was in fact the individual's corporation,[9] the communication is inadmissible.

4.2 Secondly, the State party argues that even if the Committee were to regard a corporation as being able to enjoy some substantive Covenant rights, it would not follow that a corporation would be able to submit a communication. The Committee has repeatedly held that only individuals, personally, could submit a communication.[10] In addition, the Committee has held that domestic remedies had been exhausted by the corporation, rather than the author's name. The same applies presently. Moreover, the Committee has held that a corporation owned by a single person did not have Optional Protocol standing. Accordingly, the communication is inadmissible for, in fact, being an impermissible suit by a corporation.

4.3 Thirdly, the State party argues that domestic remedies were not exhausted. The State party argues that the Superior Court, on first appeal, held contrary to the trial court's view that it lay on the party challenging the Charter of the French Language to show by persuasive evidence that there was no justification for the restrictions (rather than lying on the Attorney-General to demonstrate justification). The Court then afforded the parties the opportunity to present new evidence, which they declined. It also gave counsel for the authors' corporation (also counsel before the Committee) the right to present further evidence, if wished, at a new trial. Counsel declined. After declining the Superior Court's invitation to supplement evidence, counsel for the corporation unsuccessfully attempted to do so in the Court of Appeal. The Court of Appeal considered that the new evidence had no bearing on the matter in issue as defined by the appellant itself both in the lower courts and in its appeal factum.

4.4 The State party emphasizes that counsel for the corporation was an experienced lawyer specializing in language law. Through counsel, the corporation chose to limit its evidence and define narrowly the legal question at issue before the national courts. This legal strategy failed, and the authors cannot now seek to revise the strategic decisions made by their counsel.[11]

Now that the issue of burden of proof has been resolved, there is ongoing litigation in the domestic courts concerning the constitutionality of section 58 of the Charter of the French Language. In almost all of several dozen cases, which were stayed pending the outcome of the litigation in the instant case, the same counsel is acting and has indicated to the Attorney-General of Québec that he will be filing the evidence not filed in the litigation on the instant case. On this question, then, all appeal instances are open and a decision of the Supreme Court will be necessary practically to determine the respective rights of the parties, as well as, in consequence, the rights of persons such as the authors and their corporation. The State party thus argues that the Committee would short-circuit the domestic process if it required Québec at the present time to satisfy the Committee as to the appropriateness of section 58 of the Charter of the French Language before it had had the opportunity to do so in the domestic courts.

4.5 Fourthly, the State party argues that the authors' claims are not supported by, or do not correspond to, rights protected under the Covenant. As to the article 14 claim, the State party emphasizes the Committee's deference to factual and evidentiary findings of domestic courts unless manifestly arbitrary, amounting to a denial of justice or revealing a clear breach of the judicial duty of impartiality. The authors' corporation never raised these issues, nor do the arguments advanced support the allegations, as the record demonstrates the courts' anxiety to respect fair process. This aspect is thus inadmissible under article 2 of the Optional Protocol, for having failed to establish a violation of article 14 of the Covenant, or under article 3 of the Optional Protocol, for incompatibility with article 14.

4.6 As to the claim under article 19, the current section 58 of the Charter of the French Language evolved in response to the Committee's earlier Views and was presented in the State party's fourth periodic report. In its concluding observations, the Committee offered no comment on this matter. The authors have thus not established a violation of article 19. As to the article 26 claim, the State party refers to the Committee's earlier Views finding no breach of this article with respect to stricter legislation and thus submits there can be no violation. On article 27, the State party refers to the Committee's earlier Views that minorities within a State, rather than a province of a State, are implicated by this article which is thus not presently applicable. Finally, article 2 is a corollary right linked to a substantive right, thus not giving rise to an individual claim. In any event, Canada's legislative and administrative measures, polices and programs fully give effect to Covenant rights.

The authors' comments on the State party's submissions

5.1 By letter of 27 June 2004, the authors' responded disputing the State party's submissions. The authors, firstly, rely on the Committee's decision in *Singer* to reject any ground of inadmissibility on the grounds of corporate rights. In *Singer*, the Committee considered with reference to the personal nature of freedom of expression that author individually, and not only his company, was personally affected by the Bills concerned. The only domestic difference between the cases being that *Singer* concerned a declaratory proceeding brought by Singer's corporation, while the present case concerns a prosecution against the authors' corporation, the authors invite the Committee to apply *Singer*. The authors argue that they have the freedom to impart information concerning their business in the language of their choice, and have been personally affected by the restrictions at issue. They refer to trial testimony identifying the personal aspect of the advertising in the present case. Finally, the authors argue that if this ground of inadmissibility were to be accepted, it would exclude almost all commercial expression from Covenant protection, as most people engaged in trade do so through the vehicle of a corporation.

5.2 Secondly, as to domestic remedies, the authors reject the State party's submissions. They argue that the remarks of the Supreme Court of Canada in *Ford* and *Devine* to the effect that that French "marked predominance" requirement was justified in Charter terms were entirely based on considerations relating to the vulnerability of the French language and the *visage linguistique* of Québec. In the authors' view, these considerations did not meet the cumulative requirements of article 19, paragraph 3, and are thus in violation of the Covenant.

5.3 The authors argue that they did not refuse to introduce new evidence on the vulnerability of the French language and the *visage linguistique* of Québec to the Superior Court, on first appeal. Before the Superior Court, they stated that they would prefer to introduce such new evidence before him, rather than at a new trial. They contend the Superior Court misinterpreted this statement to mean a renunciation to provide any evidence at all, even before him. They point out, moreover, that in *Ford* and *Devine*, the Québec Government supplied evidence on the vulnerability of the French language for the first time at the level of the Supreme Court of Canada.

5.4 The authors point out that they filed extensive evidence not before the Supreme Court in *Ford* and *Devine*, including documentation relating to Canada's Covenant obligations, the submissions of the parties and the Committee's decisions in *McIntyre* and *Singer* and State practice in the area. They argue that the Superior Court judgement, upheld on appeal, had the effect of imposing a burden on an accused (to supply certain evidence) without allowing the accused to meet that burden, in violation of article 14. The fact, moreover, that other proceedings are challenging the "marked predominance" requirement does not change the fact that the present authors have exhausted available domestic remedies for their convictions.

5.5 Thirdly, the authors argue that they have more than sufficiently supported their allegations, more than sufficiently identified the rights protected under the Covenant, and more than sufficiently described the conduct in violation of those rights. The communication should thus be declared admissible.

Supplementary submissions of the State party

6.1 By note of 24 August 2004, the State party reiterated its submissions of admissibility, pointing out in particular that the current authors were not involved in the domestic proceedings, their corporation being the only party. The Committee has consistently decided that only individuals can submit a communication, and the inadmissibility of the communication does not have an impact on the scope of article 19's protection of commercial speech.

6.2 The State party emphasizes that the Superior Court invited counsel for the corporation to add to his evidence if he wished to do so in the context of a new trial. He declined to do so, preferring instead to obtain a judgement that he could appeal. After having declined the Superior Court's invitation, he again sought to add evidence before the Court of Appeal, which denied the application on behalf as the new evidence was not related to the judicial debate framed by the corporation itself in the lower courts and on appeal. The authors cannot before the Committee seek to review the strategic decisions of counsel to limit evidence and narrowly define the issues in the domestic courts.

6.3 The State party argues that it is clear that the authors mainly seek to challenge before the Committee a question of burden of proof in Canadian law. That issue has already been resolved before the domestic courts, who are currently examining the separate question of the constitutionality of section 58 of the Charter of the French language with its "marked predominance" requirement.

Issues and proceedings before the Committee

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

7.2 The Committee observes, on the issue of exhaustion of domestic remedies, that the authors' corporation, at the level of the Superior Court, expressly declined the Court's invitation to tender evidence going to the alleged insufficiency of justification of section 58 of the Charter of the French Language, being evidence not before the Supreme Court of Canada at the time it had suggested that a "marked predominance" requirement for French was be acceptable. Instead, the corporation was content to argue the issue on burden of proof only. The Court of Appeal, for its part, rejected the corporation's application to file additional evidence on the basis that it was beyond the narrow question framed by the corporation in the lower courts and on appeal. In such circumstances, the authors, through their corporation, have expressly withdrawn from the domestic courts in their case the factual elements and their assessment by the domestic courts which the Committee is now presented with, namely whether the situation currently prevailing in Québec is sufficient to justify the restrictions on article 19 rights imposed by section 58 of the Charter of the French Language. That wider question, which the authors' seek to present to the Committee through the lens of the Covenant, is the subject of current litigation in the State party's courts by the same counsel who withdrew the issue in the present case. It follows that the authors, through their corporation, have failed to exhaust domestic remedies, with the result that the communication is inadmissible pursuant to article 5, paragraph 2 (b), of the Optional Protocol.

7.3 In the light of the Committee's finding above, it need not address the remaining arguments of admissibility advanced by the State party.

8. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol;

(b) That this decision shall be communicated to the author and to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] Section 58 provides: "Public signs and posters and commercial advertising must be in French. They may also be both in French and in another language provided that French is markedly predominant. However, the Government may determine, by regulation, the places, cases, conditions or circumstances where public signs must be in French only, where French need not be predominant or where such signs, posters and advertising may be in another language only."

[2] Section 205 provides: "Every person who contravenes a provision of this Act or the regulations adopted by the Government thereunder commits an offence and is liable:

(a) For each offence, to a fine of $250 to $700 in the case of a natural person, and to $500 to $1,400 in the case of an artificial person;

(b) For any subsequent conviction, to a fine of $500 to $700 in the case of a natural person, and of $1,000 to $7,000 in the case of an artificial person.

[3] *Ford v. Québec (Attorney-General)* [1988] 2 SCR 712 and *Devine v. Québec (Attorney-General)* [1988] 2 SCR 790.

[4] The Supreme Court identified the following factors in the above cases by way of justification: (a) the declining birth rate of Québec francophones resulting in a decline in the Québec francophone proportion of the Canadian population as a whole; (b) the decline of the francophone population outside Québec as a result of assimilation; (c) the greater rate of assimilation of immigrants by the Anglophone community of Québec; and (d) the continuing dominance of English at the higher levels of the economic sector.

[5] 359/1989.

[6] 385/1989.

[7] 455/1991.

[8] *A newspaper publishing company v. Trinidad and Tobago*, case No. 360/1989, decision adopted on 14 July 1989, and *A publication and a printing company v. Trinidad and Tobago*, case No. 361/1989, decision adopted on 14 July 1989.

[9] *S.M. v. Barbados*, case No. 502/1992, decision adopted on 31 March 1994, and *Lamagna v. Australia*, case No. 737/1997, decision adopted on 7 April 1999.

[10] Ibid.

[11] The State party refers, by analogy, to the Committee's constant jurisprudence in the article 14 context: *Lewis v. Jamaica*, case No. 708/1996, adopted on 15 August 1997, *Morrison v. Jamaica*, case No. 635/1995, adopted on 16 September 1998, *Perera v. Australia*, case No. 536/1993, adopted on 28 March 1995, *Leslie v. Jamaica*, case No. 564/1993, adopted on 19 August 1998, *Morrison v. Jamaica*, case No. 611/1995, adopted on 19 August 1998.

Z. Communication No. 1235/2003, *Celal v. Greece* (Decision adopted on 2 November 2004, eighty-secondsession)*

Submitted by:	Panayote Celal (represented by counsel, Mr. Branimir Plese of the European RomaRights Center and Mr. Panayote Elias Dimitras of Greek Helsinki Monitor)
Alleged victim:	The author's son, Angelos Celal (deceased)
State party:	Greece
Date of initial communication:	14 October 2003 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 2 November 2004,

Adopts the following:

Decision on admissibility

1.1 The author of the communication is Mr. Panayote Celal, father of the alleged victim Mr. Angelos Celal, a deceased Greek national of Romani origin. He claims that his son is a victim of violations by Greece of article 6, paragraph 1, both taken alone and in conjunction with article 2, paragraphs 1 and 3, as well as of article 14, paragraph 1, of the Covenant. He is represented by counsel. The Optional Protocol entered into force in respect of the State party on 5 August 1997.

1.2 By decision of 24 February 2004, the Committee, acting through its Special Rapporteur on new communications, decided to separate the Committee's consideration of the admissibility and the merits of the case.

The facts as presented by the author

2.1 In the evening of 1 April 1998, Angelos Celal (henceforth Mr. Celal) andtwo friends, Messrs. F and R, consumed hashish in Mr. Celal's pickup truck. As the two friends got out of the pickup to clean its floor of hashish residue, shots from an unknown location were heard. Mr. Celal drove off, while Mr. F was able to resume the passenger's seat in the process and

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Maxwell Yalden.

Mr. R was left on foot. Mr. F in the passenger seat realized Mr. Celal had been shot in the head and could not drive, took control of the vehicle, allowed Mr. R to board and drove to relatives who took Mr. Celal to hospital. At the hospital, doctors pronounced Mr. Celal dead due to gunshot wounds to the head.

2.2 The author then provides the conflicting accounts of events subsequently offered by Messrs. F and R before the Mixed Criminal Court on 10 January 2001. Mr. F contended that he and Mr. Celal had stolen a vehicle and hidden it in a warehouse. On 1 April 1998, by this account, the three friends entered the warehouse to extract parts from the vehicle. Mr. F claimed to see someone in the warehouse and started running, whereupon shots were discharged. They were allegedly neither told to stop nor that they were under arrest. Mr. F claimed that police had followed him back to his settlement and that bullets recovered in his house had in fact been collected by his sister following a wedding. Mr. R, for his part, claimed that Mr. F tried to enter the warehouse but turned, shouted and started running. Mr. R claimed the police offered no warning or demand of surrender. Both men denied that they had a weapon or fired against police, and insisted that Mr. Celal drove the pickup.

2.3 The author describes the police version of events, according to which the local police station received a report on the night in question of an unidentified car discovered in the warehouse. Enquiries showed the car to have been stolen the night before. Officers P and T were despatched to the warehouse, conducted an on-site inspection and planned an ambush inside the warehouse to apprehend the thieves whom they expected. At 6 p.m., Officers Y and H joined the operation, dressed in plain clothes and wearing bullet-proof vests. When Mr. F entered the warehouse late in the evening, Officer P attempted to arrest him, but he resisted and escaped. Pursuing him out of the warehouse, the officers saw the other two men, one sitting behind the wheel of a pickup and another standing close by. The officers identified themselves and told the three suspects that they were under arrest. One suspect fired a weapon in their direction, leading to an exchange of gunfire. The pickup sped away after one suspect entered the cabin and the other boarded the rear platform. The officers attempted to stand up, having sought ground cover during the exchange of gunfire, but were again shot at. As Officer P was able to identify one suspect, the officers pursued them to his neighbourhood.

2.4 The officers located Mr. F in the family house but without a search warrant they could not enter. As a magistrate was being sought, Mr. F escaped. At the same time, the officers noticed a bloodstained pickup that had been shot at. They were informed that Mr. F had driven the vehicle, and that Mr. R and a wounded Mr. Celal had been with him. The officers eventually returned to the police station where they learnt of Mr. Celal's death.

2.5 On 5 April 1998, the police launched an internal Sworn Administrative Inquiry into the incident, followed by a supplemental inquiry on 6 December 1999, with a view to establishing responsibility at the administrative level. Both inquiries recommended that police officers P, T, Y and H not be disciplined as they had acted in self-defence. The inquiries accepted the officers' versions of the facts, finding their actions reasonable as they had opened fire against the suspects after having asked them to surrender and having been fired upon. Forensic evidence showed that an imprint of a bullet in the warehouse door was of a different calibre to the police weapons. The supplemental inquiry, which was able to hear evidence from Messrs. F and R, did not accept their account and further referred to the previous criminal records of all three suspects.

2.6 In the meantime, on 7 April 1998, the author had filed a criminal complaint with the Thessaloniki Misdemeanours Prosecutor against the four officers involved in Mr. Celal's shooting. On 16 April 1998, the police officially notified the Prosecutor of the incident.[1] On 22 May 1998, Officers P, Y and H were indicted by the Prosecutor for joint attempted homicide (articles 42, 83, 94 and 299 of the Criminal Code) and aggravated damage to another's property (articles 381 and 382 of the Code) before the Thessaloniki Misdemeanours Court and a main investigation was ordered.

2.7 On 31 January 2000, the Deputy Prosecutor, following his own investigation, filed a motion with the Judicial Council of the Misdemeanours Court, recommending acquittals for all three officers. On 23 February 2000, the Judicial Council of the Misdemeanours Court accepted the motion and acquitted the officers, reasoning that their acts could not be considered ultimately unjust, as their initial unjustness was eliminated by the fact that they had been performed in self-defence. On 25 April 2000, one of the author's counsel before the Committee made a reasoned request to the Appeals Court Prosecutor's Office to file an ex officio appeal against the Judicial Council's decision. On 26 April 2000, the Appeals Court Prosecutor ruled that there was no reason for lodging an appeal. On 15 June 2000, Mr. F was arrested. The same day, the author filed an appeal with the Judicial Council of the Appeals Court, arguing that as the three suspects had posed no threat to the safety of the officers, there could be no question of self-defence and Mr. Celal's death was accordingly unlawful. On 20 July 2000, the Judicial Council of the Appeals Court rejected the appeal on the procedural ground that the requisite power of attorney authorizing the author's lawyer to act on his behalf was absent. Under Greek law, there are no grounds for a further appeal seeking leave that such a procedural flaw be remedied and thus the decision is effectively final. On 5 September 2000, Mr. R was arrested.

2.8 On 10 January 2001, Messrs. F and R were arraigned before the Serres Mixed Criminal Court, comprising three judges and four jurors. Mr. F was convicted of attempted murder and a variety of property and firearms offences, and Mr. R was convicted of an offence against property. On 1 April 2003, after the unsuccessful conclusion of criminal proceedings, the author filed a claim for civil damages before the Thessaloniki first instance court. The proceedings were pending at the time of submission of the communication.

The complaint

3.1 The author argues that Mr. Celal's death was an arbitrary deprivation of life contrary to article 6, paragraph 1, of the Covenant as the use of force was unjustified and/or excessive. The operation also reveals clearly inadequate planning and control on the part of the police. The author contends that the State party has not discharged its burden of providing a plausible alternative explanation, based on independent evidence, to what occurred.[2] He argues, referring to the Committee's Views in *Suarez de Guerrero v. Colombia*,[3] that the officer's domestic acquittal does not absolve the State party from its Covenant obligations and independent international assessment of the facts claimed.

3.2 The author refers to the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials,[4] the Committee's general comment on article 6 and jurisprudence of the European Court of Human Rights[5] for the proposition that where the security threat to police is not clearly imminent or grave and where the crime suspected is neither serious nor life-threatening, use of firearms is illegitimate. The author argues that the objective evidence in the case does not support the officers' claims that the suspects were armed, fired at least six times and thus posed a threat to their safety. The officers who conducted an in situ investigation hours after the incident found only one bullet of a different calibre to the police weapons, while recovering 14 cartridges and tow bullets from the latter. The author claims that the Prosecutor overlooked this discrepancy involving the number of shots allegedly fired by the suspects, and concluded on the basis of insufficient evidence - that ammunition of the same calibre had been discovered at Mr. F's house - that the bullet came from Mr. F's gun. The author points out that a minority of the Mixed Criminal Court were not convinced that any of the suspects were armed.

3.3 Even if the suspects opened fire, the author argues that the response of at least 14 bullets to one by the suspects was disproportionate. The high number of shots discharged in the direction of all three suspects (rather than at the shooter) suggests the officers were shooting with intent to kill or reckless disregard of such a consequence. The author proceeds to argue that even if the officers had been justified in initially opening fire, there is no evidence of continued threat at the end of the incident when Mr. Celal was shot and killed. The examination showed that the pickup was struck by nine bullets, six lodged at the rear, suggesting the vehicle was leaving the scene when fired upon. Officer Y deposed that when the suspects got on the pickup, the police stopped firing as the danger had passed. Officer P, by contrast, deposed that as the car was leaving, the officers stood up only to be fired upon again two or three times and he thus returned fire - his final shots, of which four cartridges were recovered - were found by the Prosecutor to have fatally wounded Mr. Celal. The other officers indicated that Officer P alone fired, as they were still lying on the ground.

3.4 Even on Officer P's version of the facts, the author disputes whether the parting shots could be justified in self-defence. The three suspects were fleeing an ambush on a moonlit night in a veering car (the front tyre being flat). It was thus highly unlikely for them to be able to fire accurately on officers lying on the ground. It was for the same reason unnecessary and inappropriate for Officer P to stand, exposing himself to injury, and continue to use deadly force after the suspects had ceased to threaten his safety. In particular, there is no allegation that Mr. Celal, who the evidence showed was almost certainly driving the pickup away, posed any risk. There is no evidence that he, rather than the suspected who boarded the flatbed, fired a weapon.

3.5 The author argues that the failure in planning and controlling the ambush to take sufficient measures to minimize the threat to police contributed to Mr. Celal's arbitrary killing. The author argues, with reference to the European Court of Human Rights,[6] that issues of planning and control, including the making of allowance for alternative possibilities to use of deadly force, are relevant to the assessment of arbitrary deprivation of life. The judicial investigation did not consider this aspect of the incident. Officer P, the senior officer present, is to be held responsible in this regard - he was familiar with the area, had ample time to plan the operation and decided to place the police team in the warehouse in the absence of other natural cover. This latter decision exposed the officers to undue risk for - as indeed occurred - they would be vulnerable upon leaving the warehouse to confront any individual and increase the likelihood of resort to force. In addition, Officer P apparently assumed a high threat level by issuing (rare) bullet proof vests and ordering a sub-machine gun be brought, while neglecting other ready measures such as putting nearby units on standby and making provision for prompt communication with them, including for provision of necessary medical aid. Nor were safer measures apparently considered, such as putting the warehouse under surveillance or setting up a roadblock. The fact that the ambush took place on a moonless night in a poorly lit area also made a clear line of fire difficult, increasing the likelihood that Mr. Celal rather than the likely target Mr. F was struck. In addition, the fact that the police apparently used the stolen vehicle in the warehouse to pursue the suspects (their patrol car being parked some distance away) discloses, in the author's view, poor planning of the operation.

3.6 The author also claims a violation of article 2, paragraphs 1 and 3, in conjunction with article 6, paragraph 1, as the prosecuting and judicial authorities allegedly failed to conduct a prompt, comprehensive, thorough, independent and impartial investigation and subsequently acquitted the officers. They allegedly ignored independent incriminating evidence and failed to afford Mr. Celal's family any effective judicial remedy. With reference to the Committee's jurisprudence,[7] the United Nations Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions and jurisprudence of the European Court of Human Rights,[8] the author argues that the requirements of an effective investigation/remedy were not met. In particular, neither police nor judicial investigations plausibly showed that the three suspects were armed, had at any point posed a threat to the officers or, alternatively, posed a threat sufficient to justify deadly force. The Prosecutor allegedly failed seriously and impartially to assess the detailed accounts offered by the suspects themselves, to compare their accounts to the forensic facts or take into account the inadequate planning and operation. The Prosecutor and courts overlooked factual discrepancies, incriminating objective evidence and unlikely statements of police officers. Finally, by acquitting the officers, the State party irrevocably denied redress for Mr. Celal's arbitrary killing.

3.7 The author claims a violation of article 14, paragraph 1, on the basis that the State party's courts arbitrarily assessed the available evidence and denied justice as a result to the surviving family members. The author refers, in particular, to the courts' alleged failure to consider the incident on its merits in a fair and public hearing despite allegedly compelling evidence of the arbitrary deprivation of Mr. Celal's life.

3.8 As to the exhaustion of domestic remedies, the author argues, with respect to the pending civil complaint, that a victim is only required to pursue one remedy to exhaustion (that is, the criminal complaint), even if other remedies are available. In any event, given the grave nature of the case, only a criminal remedy can be considered effective and sufficient and thus necessary to exhaust. He argues that the dismissal of the author's appeal on procedural grounds is of no consequence "as it does not alter the crucial fact that the Greek authorities had knowledge of the incident at issue yet still failed to provide redress".

The State party's submissions on the admissibility of the communication

4.1 By submission of 9 February 2003, the State party contested the admissibility of the communication for failure properly to exhaust domestic remedies. The State party offers its account of the material facts in the following terms to the extent that they differ or supplement the author's account: the three suspects arrived at the warehouse, with Mr. R driving. Mr. F was the first to enter the warehouse and was accosted by Officer P who identified himself and ordered him to surrender. Mr. F struck the officer in the face and ran out screaming "danger" to his accomplices. Mr. F and Mr. Celal fled to their pickup. Upon being ordered to freeze, Mr. F shot at the officers. Crossfire ensued as the officers sought to defend themselves and immobilize the pickup by shooting at its tyres. Mr. Celal, sitting next to the driver, was lethally wounded in the head. Another bullet struck a tyre of the car, however the suspects escaped in the vehicle to the Romani settlement where Mr. F lived. After the suspects handed Mr. Celal over to relatives who took him to hospital, Mr. F hid in the settlement. When the police arrived, they searched for him but due to delay in the arrival of a justice of the peace to authorize a home search he escaped.

4.2 The Security Division of Thessaloniki was immediately notified, and they sealed the area in the early morning of 2 April 1998 to prepare a search and seizure report. All findings (cartridge cases, holes, fingerprints) were evaluated and sworn testimony from officers and witnesses taken. A search report was made the same day on the suspects' pickup.
On 7 April 1998, a report was made to the police's Criminal Investigation Division, who prepared an expert report dated 25 February 1999 after carrying out a laboratory examination of all findings (the officers' weapons, 14 cartridge cases, three bullets and one metal fragment) and taking witness testimony.

4.3 The State party explains how according to its criminal procedure, a civil claim for compensation can be attached by a victim (or, in the case of death, his or her family) to criminal proceedings. Compensation is thus payable to this civil party in the event of a conviction, but only if the civil party joins the criminal proceedings in support of the charge. A declaration to this effect may be submitted either pretrial or in court up to the time of the first instance verdict, but must be accompanied by the appointment by a process agent in the event that the civil party does not reside the in the court's territorial jurisdiction. If this condition is not fulfilled, the civil claim is inadmissible. The law also provides that a court on application for a legal remedy (appeal) shall hear the parties and receive the prosecutor's proposal before declaring a claim inadmissible. The State party observes that a properly joined civil party gains full right to participate in the overall criminal proceeding.

4.4 The State party argues that in the present case the author was summoned to appear before the Appeals Court to present his views on the admissibility and merits of the appeal, but did not do so.[9] Thus, he did not give the Appeals Court the opportunity to explain his failure to appoint a process agent or his arguments in favour of criminal liability for the police officers, as they are now presented to the Committee. The Appeals Court thus accepted the proposal of the prosecutor to declare the appeal inadmissible for failure to appoint a process agent between the filing of his initial claim on 7 April 1998 and the entry of acquittal by the Misdemeanours Court in 2000. The author's procedural conduct also made further review of the case by the Court of Cassation impossible, as that Court would be restricted to a determination of whether it was within the power of the Appeals Court to dismiss the case on the inadmissibility ground advanced.

4.5 With reference to jurisprudence of the European Court of Human Rights to the effect that domestic remedies cannot be considered to have been exhausted whether they are dismissed for technical reasons due to procedural negligence on the part of the applicant,[10] the State party argues that the present communication should be similarly dismissed under article 5.

paragraph 2 (b), of the Optional Protocol. The author himself was responsible for his failure to appoint a process agent or appear before the Appeals Court to explain his failure to do so, and thus for depriving both the Appeals Court as well as the Court of Cassation of the opportunity to engage in merits review of the case, and thus should not be permitted to claim that domestic remedies have been exhausted.

Comments by the author on the State party's submissions

5.1 By letter of 23 April 2004, the author responded to the State party's submissions on admissibility, arguing that the latter suggested it was up to the author to obtain redress rather than the authorities to afford it. The author contends that even under the State party's domestic law, there is an ex officio obligation in cases of murder, manslaughter or other serious crimes to prosecute, which does not involve relatives of victims at all. Relatives may simply constitute themselves as civil parties in the courtroom, as the State party has observed.

5.2 The author argues that the Prosecutor should and could have appealed ex officio the acquittal decree entered by the Misdemeanours Court, rather than recommending to it the dropping of the charges. Likewise, the Appeals Court Prosecutor should have filed an appeal against the decision, rather than concluding not to. It was after this refusal that the father filed his appeal. The author argues that it was his original complaint that even triggered the Prosecutor's investigation, contrary to usual practice where the police themselves inform the Prosecutor of an incident.

5.3 Concerning the appointment of a process agent, the author submits that this would be an additional burden on him as he would have to appoint, and pay, a second lawyer in the area of the court in order to ensure proper service of documentation. The author argues that his illiteracy and unawareness of the obligation to appoint such an agent should be taken into account. When the original complaint was filed, the Prosecutor's office did not inform him of the need to appoint a process agent, which would have led him - having travelled a significant distance to Thessaloniki - to seek one. In addition, the author's lawyer at the time who wrote the original complaint was told by the author that he did not want to get involved with a complaint against the police, so that the lawyer did not sign the complaint but handed it to the author to file on his own behalf.

5.4 The author argues that in any event the appointment of a process agent is a mere formality. Its absence did not prevent the authorities from conducting their investigation or serving the notice of acquittal on the author outside the court's district, or the courts from deliberating. The author did file a timely substantive appeal with the court, which was only not considered due to the technicality of the lacking process agent. In any case, the author submits that the procedure by which the author was said to be notified of the forthcoming hearing was "improper", as it cannot be ascertained whether an oral or phone call as required by the statute was indeed made.

5.5 The author thus argues that he exhausted adequate and effective domestic remedies, even though there was an ex officio obligation upon the prosecuting authorities to conduct a prompt and impartial investigation which was not initiated prior to the author's complaint. He argues that the European Court of Human Rights has held that only a criminal remedy identifying and punishing perpetrators, rather than compensation to the victim alone, may be considered effective, necessary and sufficient for such serious cases.[11] He contends that otherwise states would in effect be able to use civil damages awards to pay themselves out of the most serious human rights violations. The author concludes by arguing that even if he had never brought a complaint, the State party would have been under a duty to investigate the incident once it came to their attention.

Issues and proceedings before the Committee

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee observes that the State party challenges the admissibility of the communication on the basis of the author's failure properly to pursue his appeal against the Thessaloniki Misdemeanours Court's acquittal of the three officers criminally charged, without making any argument relating to the author's institution of a separate civil action in 2003. The Committee refers to its constant jurisprudence that in cases involving violations of the most basic rights, such as the right to life, there is a Covenant duty upon the State party to investigate the conduct at issue.[12] The Committee observes that in this case, the State party did investigate the circumstances of Mr. Celal's loss of life, with the Misdemeanours Court concluding that no criminal liability should attach, the officers having on the facts of the case acted in self-defence. The Committee observes that it is not generally its role, as an international instance, to substitute its views of facts and evidence for those of the domestic court.

6.3 In a case such as the present where the first instance court has found against an individual's interest, it will usually be the victim, or an individual such as a relative acting on his or her behalf, who will be in a position to bring such a disposition of a case to a higher court for review thereof. The Committee recalls that the function of the exhaustion requirement under article 5, paragraph 2 (b), of the Optional Protocol is to provide the State party itself with the opportunity to remedy the violation suffered, in this case, allegedly by the conduct of the investigating and prosecuting authorities and the first instance Misdemeanours Court. The Committee observes that, on the information before it, the author's appeal would not simply have concerned the question of civil party compensation, but concerned the overall resolution of the criminal proceedings - the State party describes a civil party as "entitled not only to pursue the satisfaction of his civil claims before the criminal court, but also to participate in the overall criminal proceedings (both at the prestage trial and during the trial) to support the charge and pursue the conviction of the offender".

6.4 The Committee refers to its jurisprudence that in situations where a State party circumscribes rights of appeal with certain procedural requirements such as time limits or other technical requirements, an author is required to comply with these requirements before he or she can be said to have exhausted domestic remedies.[13] In the present case, the author neither appointed a process agent in the court's district prior to the Misdemeanours Court's resolution of the case nor appeared before the Appeals Court to make submissions on the absence of an agent and the case as a whole. The result of the author's conduct was that both the Appeals Court and the Court of Cassation were deprived of the ability to consider the merits of the appeal. It follows that the author has failed to exhaust domestic remedies and that the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

7. The Committee therefore decides:

(a) That the communication is inadmissible under article 5, paragraph 2 (b) of the Optional Protocol; and

(b) That this decision will be transmitted to the author and to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] The author argues that this occurred in violation of Greek law requiring public officials to inform the prosecutor of an illegal act as soon as they become aware of it.

[2] Reference is made to the judgement of the European Court of Human Rights in *Ogur v. Turkey* 21 EHRR 40, 2001, at paras. 73, 75, 77, 79, 81 and 84.

[3] Case No. 45/1979, Views adopted on 31 March 1982, at paras. 13.1 and 13.3. Reference is also made to the judgement of the European Court of Human Rights to similar effect in *Ribitsch v. Austria* 21 EHRR 573, at 34.

[4] Article 9 provides: "Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional use of forearms may only be made when strictly unavoidable to protect life."

[5] *Stewart v. United Kingdom* No. 1044/82, 39 DR 162 (1984).

[6] *McCann v. United Kingdom* 21 EHRR 97, at 150.

[7] *Herrera v. Colombia*, case No. 161/1983, Views adopted on 2 November 1987, at para. 10.3; *Santullo v. Uruguay*, case No. 9/1977, Views adopted on 26 October 1979, at para. 12; and *Bleier v. Uruguay*, case No. 30/1978, Views adopted on 24 March 1980, at paras. 11.2 and 14.

[8] *McCann*, op. cit., at 161, and *Jordan v. United Kingdom* App. No. 24746/94. Judgement of 4 May 2001, at 106-109.

[9] Article 476 of the Code of Criminal Procedure provides that the appellant (or process agent) should be thus advised at least 24 hours before the case is to be heard by the clerk of the prosecutor's office either orally or by phone at the address listed in the appeal document, with a note to this effect being entered in the case file.

[10] *T.W. v. Malta* App. No. 25644/94, judgement of 29 April 1994, at para. 34, and *Navarra v. France* Series A No. 273-B, judgement of 23 November 1993, at para. 24.

[11] *A.V. v. Bulgaria* judgement of 18 May 1999 and *Kaya v. Turkey* judgement of 18 May 1999, Reports 1998-I, p.329 at para. 105.

[12] *Baboeram et al. v. Suriname* Case Nos. 146,148-154/1983, Views adopted on 4 April 1985, *Herrera Rubio v. Colombia*, case No. 161/1983, Views adopted on 2 November 1987, *Sanjuán Arévalo v. Colombia*, case No. 181/1984, Views adopted on 3 November 1989, *Minago Muiyo v. Zaire*, case No. 194/1985, Views adopted on 27 October 1987, *Mojica v. Dominican Republic*, case No. 449/1991, Views adopted on 15 July 1994.

[13] See *A.P.A. v. Spain*, case No. 433/1990, decision adopted on 25 March 1994, and *P.L. v. Germany*, case No. 1003/2001, decision adopted on 22 October 2003.

AA. Communication No. 1292/2004, *Radosevic v. Germany* (Decision adopted on 22 July 2005, eighty-fourth session)*

Submitted by:	Mr. Marijan Radosevic (represented by counsel, Mr. Frank Selbmann)
Alleged victim:	The author
State party:	Germany
Date of communication:	27 May 2004 (initial submission)
Subject matter:	Unequal remuneration of work performed by prisoners
Procedural issues:	Substantiation of claims by author - Exhaustion of domestic remedies
Substantive issues:	Right to equality before the law and to equal protection of the law - Permissible exceptions to prohibition of forced or compulsory labour - Reformation and social rehabilitation of prisoners
Articles of the Covenant:	8 (3) (c) (i), 10 (3) and 26
Articles of the Optional Protocol:	2 and 5 (2) (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 22 July 2005,

Adopts the following:

Decision on admissibility

1. The author of the communication is Mr. Marijan Radosevic, a Croatian national currently residing in Switzerland. He claims to be a victim of a violation by Germany[1] of his rights under article 26, read alone, as well as in conjunction with article 8, paragraph 3 (c) (i), of the Covenant. He is represented by counsel (Mr. Frank Selbmann).

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Factual background

2.1 The author served a prison term in Heimsheim prison in Germany from 10 March 1998 to 28 February 2003, when he was deported. The remainder of his prison term was suspended, provided that he would not return to Germany.

2.2 During imprisonment, the author performed work, as required under section 41 of the German Enforcement of Sentences Act. He was remunerated from April 1998 until August 1999 and again in April 2000, as well as from June until August 2001. The wages were calculated pursuant to section 200 of the Enforcement of Sentences Act, on the basis of 5 per cent of the base amount[2] from April until August 1999 and in April 2000, and on the basis of 9 per cent of the base amount from June until August 2001. They ranged from about 180 to about 400 Deutsche Mark (DM) per month.

2.3 On 28 April 2000, the author suffered an employment-related accident, which made him permanently unfit for work.

2.4 By judgement of 1 July 1998, the Federal Constitutional Court ruled that the constitutional principle of resocialization of prisoners requires adequate remuneration for their work; the Court set aside the calculation methods for the wages of prisoners laid down in section 200 of the Enforcement of Sentences Act (5 per cent of the base amount, despite the legislator's original intention progressively to raise the level of remuneration to 40 per cent of the base amount). It considered the average wages paid to prisoners under that legislation, which amounted to 1.70 DM per hour or 10 DM per day, or 200 DM per month, in 1997, to be incompatible with the German Basic Law, in the absence of any other work-related benefits apart from the employer's contribution to the prisoner's unemployment insurance. The Court argued that "in the light of the amount paid for mandatory work performed by a prisoner, he cannot be convinced that honest work is an appropriate means for earning a living" after his release. However, it allowed the legislator a transitional period, to run until 31 December 2000, to introduce an adequate raise in the remuneration of work as well as revised provisions for social insurance coverage of such work.

2.5 On 12 February 2004, the author submitted a request to the warden of Heimsheim prison, requesting remuneration of no less than 40 per cent of the base amount for the work performed prior to his employment-related accident on 28 April 2000. On 19 February 2004, the warden of Heimsheim prison considered that, the author was estopped from challenging the calculation of his wages, since he had not taken any legal action against the relevant decisions within the one-year deadline that resulted from section 112, paragraph 4, of the Enforcement of Sentences Act.

2.6 On 4 March 2004, the author reiterated his request for payment of adequate wages, arguing that section 112, paragraph 4, of the Enforcement of Sentences Act did not apply to his case and that, in any event, the decisive date for the computation of the deadline was the date of his release on 28 February 2003, that is, less than a year before he lodged his first request for reassessment of the wages (12 February 2004). By reference to the judgement of the Federal Constitutional Court and to article 26 of the Covenant, he claimed that these wages were grossly and unjustifiably disproportionate to the average wages paid to employees outside the prison system. On 9 March 2004, the warden of Heimsheim prison reiterated the position stated in his previous letter.

The complaint

3.1 The author claims that the denial of an adequate remuneration for the work performed during his incarceration amounts to a violation of article 26 of the Covenant. He argues that his work was in many respects similar to that performed by the regular workforce. While conceding that prisoners are not entitled to absolutely equal remuneration, he submits that any differentiation must be justified by reasonable and objective criteria and must be proportionate in the individual circumstances. His remuneration was inadequate in the light of his vulnerable status as a prisoner and the overall objective of reintegration into society. By reference to Rule 76 (1)[3] of the United Nations Standard Minimum Rules for the Treatment of Prisoners and article 14 (1)[4] of ILO Convention No. 29 (Forced or Compulsory Labour Convention, 1930), the author concludes that his wages were disproportionately low, in violation of article 26 of the Covenant.

3.2 The author claims that the transitional period of two years and six months for the legislative adjustment of section 200 of the Enforcement of Sentences Act, during which he was continued to be remunerated on a discriminatory basis, was also disproportionate and contrary to article 26. Even assuming that this period was justified under German constitutional law, such justification could not change the underlying violation of article 26, which required corrective measures to be taken without undue delay, once discrimination was established. The delay was not justified by any compelling reasons; the mere financial burden on a State did not suffice as a justification.

3.3 The author submits that the same matter is not being examined under another procedure of international investigation or settlement. On exhaustion of domestic remedies, he argues that it would have been futile to appeal the decision of the Heimsheim prison warden, given that the Federal Constitutional Court had itself authorized the continued application of section 200 of the Enforcement of Sentences Act until 31 December 2000 and that, in a subsequent judgement,[5] it had considered that the new legislation satisfies, even though barely so, the requirement of a significant raise of the remuneration of prison work stipulated in its earlier judgement.

State party's observations on admissibility

4.1 On 3 August 2004, the State party challenged the admissibility of the communication, invoking the German reservation concerning article 26 of the Covenant, as well as an abuse of the right of application within the meaning of article 3 of the Optional Protocol.

4.2 The State party submits that the Committee's competence to examine the alleged violation of article 26 is precluded by the German reservation, since the author did not claim a violation of a substantive Covenant right: The right to property is not protected under the Covenant; the prison work performed by him falls outside the prohibition of forced or compulsory labour in article 8, paragraph 3, of the Covenant, which specifically excludes any work or service normally required of a person who is under detention in consequence of a lawful order of a court.[6] The *travaux préparatoires* of article 8 reveal that a proposal to include a right of prisoners to equitable remuneration for their work was rejected by the Commission on Human Rights.[7]

4.3 The State party argues that there is no indication that the reservation itself is inadmissible. While the Committee expressed its regret "that Germany maintains its reservations, [...] which partially limit the competence of the Committee with respect to article 26 of the Covenant" and recommended considering their withdrawal,[8] it did not conclude that they are inadmissible.

4.4 For the State party, the author's late submission of his complaint about the allegedly discriminatory remuneration of the prison work that he performed between April and August 1999 and in April 2000 to the Heimsheim prison warden and, subsequently, to the Committee constitutes an abuse of the right of application. Although no specific time limit exists for the submission of a communication under the Optional Protocol, the Committee has held that the late submission of a complaint can amount to such abuse, in the absence of any justification.[9] The author's explanation, provided in his letter of 4 March 2004 to the prison warden, that he was unaware of the legal situation, being a foreign national, and that legal advice was unavailable to him, did not justify the delay, since it was hardly conceivable that the Federal Constitutional Court's judgements of 1 July 1998 and of 24 March 2002 were not discussed among prisoners, whose interests were directly affected by these decisions, and since the author would have been free to seek legal advice during his incarceration.

Author's comments

5.1 On 22 September 2004, the author commented on the State party's admissibility submission, arguing that his claim bears a sufficient link to article 8, paragraph 3 (c) (i), of the Covenant and that, in any event, the State party's reservation concerning article 26 is incompatible with the object and purpose of the Covenant. He denies an abuse of the right of petition on his part.

5.2 For the author, the subject matter of his case is regulated in article 8, paragraph 3 (c) (i), which allows States parties to oblige convicted prisoners to perform work "normally required" of such individuals. In his initial submission, he invoked article 26 in isolation from article 8, paragraph 3 (c) (i), because it provided more precise guidelines on what may be required of a prisoner than the latter provision, which remains silent on the specific conditions of prison work. However, in the light of the State party's admissibility observations, he now alleges breaches of both article 26 as a free-standing right, and read in conjunction with article 8, paragraph 3 (c) (i), of the Covenant. Read together with article 8, paragraph 3 (c) (i), which protects not only against "arbitrary decisions by prison authorities", but also against laws which prescribe arbitrary conditions of prison work, article 26 was applicable irrespective of the German reservation, requiring adequate remuneration for work performed by prisoners.

5.3 The author challenges the German reservation as being incompatible with the character of article 26 as an autonomous right to equality free from any limitations inherent in accessory non-discrimination clauses, such as article 14 of the European Convention on Human Rights. The effect of the reservation was to transform article 26 into an accessory right without independent existence, thereby duplicating the limited intra-Covenant non-discrimination clause of article 2 of the Covenant. This restrictive scope was neither intended by the drafters of article 26, nor supported by any of the traditional means of treaty interpretation. It was moreover inconsistent with the Committee's constant jurisprudence on article 26[10] and defied recent trends to extend the level of protection afforded under international equal protection clauses. Thus, article 1 of Protocol No. 12 to the European Convention on Human Rights, once entered into force, would replace article 14 of the Convention with an independent right identical to article 26 of the Covenant; similar autonomous non-discrimination clauses can be found in article 24 of the American Convention on Human Rights and article 3 of the African Charter on Human and Peoples' Rights. The author contends that what the Committee regretted in its concluding observations on Germany's fifth periodic report "amounts to a reservation that unduly infringes upon the very essence of the right established in article 26 of the Covenant and should be found inapplicable".

5.4 As regards the late submission of his communication, the author reiterates that, as a Croatian national without legal training, he could not be expected to follow the jurisprudence of the German Constitutional Court, which was extremely complex on the subject matter and therefore unlikely to become the topic of debate in a prison setting. On accessibility of legal advice, he submits that prison-internal legal services are rare in German prisons and that his deportation directly after his release on parole prevented him from contacting a lawyer. Once he had been able to secure legal representation, he and his counsel acted promptly and with due diligence. He denies that the Committee's decision in *Gobin v. Mauritius* is a precedent to be followed, given that five Committee members dissented and considered that the Committee was precluded from introducing a preclusive time limit in the Optional Protocol,[11] and that another member considered that a delay of five years should not be taken as a reason for shifting the burden of proof that such delay was (not) abusive from the State party to the author.[12]

Additional observations by the State party

6.1 In its additional observations dated 6 December 2004, the State party criticized that the author seeks to circumvent the German reservation concerning article 26 by invoking article 8, paragraph 3 (c) (i), although this provision does not guarantee a right to equitable remuneration for work performed by prisoners. The conditions of such work could not be regulated in detail in a general convention relating to civil and political rights, even though this might seem necessary in the case of permissible compulsory labour. Since the right to equitable remuneration for work performed by prisoners could only be derived from article 26, the subject matter of the author's complaint fell outside the Committee's competence.

6.2 The State party recalls that Protocol No. 12 to the European Convention on Human Rights has not yet entered into force. Germany has only signed but not ratified the Protocol; its reservation concerning article 26 of the Covenant was consistent with its existing obligations under article 14 of the European Convention, an accessory non-discrimination clause.

6.3 The State party reiterates its arguments in respect of the author's alleged abuse of his right of petition. By reference to *Gobin v. Mauritius*, it argues that the Committee's decision itself was authoritative, and not the dissenting opinions invoked by the author.

Issues and proceedings before the Committee

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

7.2 The Committee notes the author's argument that his remuneration calculated on the basis of 5 per cent of the base amount between April 1998 and August 1999 and in April 2000, and on the basis of 9 per cent of the base amount between June and August 2001, was grossly and unjustifiably disproportionate to wages paid for similar work performed by the regular workforce, thereby violating his right to equality under article 26 of the Covenant. It also notes that the State has invoked its reservation to article 5, paragraph 2 (a), of the Optional Protocol, to the extent that it precludes the Committee from examining communications "by means of which a violation of article 26 [...] is reprimanded, if and insofar as the reprimanded violation refers to rights other than those guaranteed under the aforementioned Covenant". The Committee considers that the author has not sufficiently substantiated, for purposes of admissibility, his claim that he was a victim of discrimination based on his status as a prisoner because he received only a small part of what he would have been paid on the labour market. In particular, he has not provided any information on the type of work that he performed during his incarceration and whether it was of a kind that is available in the labour market, nor about the remuneration paid for comparable work in the labour market. Mere reference to a certain percentage of the base amount, i.e. the average amount of benefits payable under the German statutory pensions insurance scheme, does not suffice to substantiate the alleged discriminatory discrepancy between the remuneration for his work and work performed by the regular workforce. It follows that this part of the communication is inadmissible under article 2 of the Optional Protocol. The Committee therefore need not address the issue of the State party's reservation concerning article 26.

7.3 The Committee further notes the author's claims that article 26, read in conjunction with article 8, paragraph 3 (c) (i), contains a right to adequate remuneration for work performed by prisoners, and that he was discriminated against in the enjoyment of that right because of the continued application of section 200 of the Enforcement of Sentences Act for a transitional period of two years and six months after the Constitutional Court had declared that provision incompatible with the constitutional principle of resocialization of prisoners. It considers that article 8, paragraph 3 (c) (i), read in conjunction with article 10, paragraph 3, of the Covenant requires that work performed by prisoners primarily aims at their social rehabilitation, as indicated by the word "normally" in article 8, paragraph 3 (c) (i), but does not specify whether such measures would include adequate remuneration for work performed by prisoners. While reiterating that, rather than being only retributory, penitentiary systems should seek the reformation and social rehabilitation of prisoners,[13] the Committee notes that States may themselves choose the modalities for ensuring that treatment of prisoners, including any work or service normally required of them, is essentially directed at these aims. It notes that the German Constitutional Court justified the transitional period, during which prisoners were continued to be remunerated on the basis of 5 per cent of the base amount, with the fact that the necessary amendment of section 200 of the Enforcement of Sentences Act required a reassessment by the legislator of the underlying resocialization concept. It further recalls that it is generally for the national courts, and not for the Committee, to review the interpretation or application of domestic legislation in a particular case, unless it is apparent that the courts' decisions are manifestly arbitrary or amount to a denial of justice.[14] The Committee considers that the author has not substantiated any such defects in relation to the Constitutional Court's decision to allow the legislator a transitional period until 31 December 2000 to amend section 200. Accordingly, this part of the communication is inadmissible under article 2 of the Optional Protocol.

8. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the authors.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] The Covenant and the Optional Protocol to the Covenant entered into force for Germany on 23 March 1976 and 25 November 1993 respectively. Upon ratification of the Optional Protocol, the State party entered the following reservation: "The Federal Republic of Germany formulates a reservation concerning article 5 paragraph 2 (a) to the effect that the competence of the Committee shall not apply to communications:

(a) Which have already been considered under another procedure of international investigation or settlement; or

(b) By means of which a violation of rights is reprimanded having its origin in events occurring prior to the entry into force of the Optional Protocol for the Federal Republic of Germany.

(c) By means of which a violation of article 26 of the [said Covenant] is reprimanded, if and insofar as the reprimanded violation refers to rights other than those guaranteed under the aforementioned Covenant."

[2] Section 18 of Book IV of the German Social Security Code defines the base amount as follows: "Without prejudice to the specific provisions applicable to the different insurance systems, base amount within the meaning of the provisions on social security means the average amount of benefits payable under the statutory pensions insurance during the preceding calendar year, rounded up to the next highest amount which can be divided by 420."

[3] "There shall be a system of equitable remuneration of the work of prisoners."

[4] "With the exception of the forced or compulsory labour provided for in article 10 of this Convention, forced or compulsory labour of all kinds shall be remunerated in cash at rates not less than those prevailing for similar kinds of work either in the district in which the labour is employed or in the district from which the labour is recruited, whichever may be the higher."

[5] German Constitutional Court, judgement of 24 March 2002, 2 BvR 2175/01.

[6] See article 8, paragraph 3 (c) (i), of the Covenant.

[7] UN Doc. E/CN.4/365.

[8] Human Rights Committee, eightieth session, concluding observations on the fifth periodic report of Germany, 4 May 2004, at para. 10.

[9] The State party refers to communication No. 787/1997, *Gobin v. Mauritius*, decision on admissibility adopted on 16 July 2001, at para. 6.3.

[10] The author refers to communication No. 172/1984, *Broeks v. The Netherlands*, Views adopted on 9 April 1987, at para. 12.1, communication No. 182/1984, *Zwaan-de Vries v. The Netherlands*, Views adopted on 9 April 1987, at para. 12.1, and general comment 18 [37], 9 November 1989, at para. 12.

[11] Communication No. 787/1997, *Gobin v. Mauritius*, decision on admissibility adopted on 16 July 2001, individual opinion by Committee members Christine Chanet, Louis Henkin, Martin Scheinin, Ivan Shearer and Max Yalden (dissenting).

[12] Ibid., individual opinion by Committee member Eckart Klein (dissenting).

[13] General comment 21 [44], 10 April 1992, at para. 10.

[14] Communication No. 1188/2003, *Riedl-Riedenstein et al. v. Germany*, decision on admissibility adopted on 2 November 2004, at para. 7.3; communication No. 1138/2002, *Arenz et al. v. Germany*, decision on admissibility adopted on 24 March 2004, at para. 8.6.

BB. Communication No. 1326/2004, *Morote Vidal and Mazón Costa v. Spain* (Decision adopted on 26 July 2005, eighty-fourth session)*

Submitted by:	José Luis Mazón Costa and Francisco Morote Vidal (represented by counsel, Mr. José Luis Mazón Costa)
Alleged victim:	The authors
State party:	Spain
Date of communication:	22 August 2002 (initial submission)
Subject matter:	Impossibility for a lawyer to challenge an allegedly hostile judge
Procedural issues:	The case has been submitted to another procedure of international investigation or settlement; exhaustion of domestic remedies
Substantive issues:	Right to an impartial tribunal
Articles of the Covenant:	14, paragraph 1, and 26
Articles of the Optional Protocol:	5, paragraph 2 (a)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 26 July 2005,

Adopts the following:

Decision on admissibility

1.1 The authors of the communication, which is dated 22 August 2002, are José Luis Mazón Costa (first author) and Francisco Morote Vidal (second author), both Spanish nationals. They allege violations by Spain of the rights recognized in article 14, paragraph 1, and article 26 (in conjunction with article 14, paragraph 1) of the Covenant. Mr. Mazón is representing himself and Mr. Morote.

1.2 The Optional Protocol entered into force for the State party on 25 April 1985.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Jonson López, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsooner Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Factual background

2.1 In October 1994, the first author represented the second author in a claim in which the latter requested a change in the maintenance allowance awarded to his wife in a previous divorce proceeding. On 10 July 1995, the claim was dismissed by Murcia court of first instance No. 3. Subsequently, the first section of the Murcia provincial high court rejected an appeal.

2.2 The authors allege that, during the proceedings in the provincial high court, the court did not inform them of the names of the judges who were members of the court nor the name of the reporting judge in the case, which is contrary to article 203.2 of the Judiciary Act. According to the authors, it is the practice of the first section, unlike other sections of the provincial high court, not to fulfil this legal obligation. The reporting judge has a decisive effect on the outcome of a case, since he is the one who drafts the judgement and, in practice, decides the case, since, owing to the large number of cases in the provincial high courts, collegiality is purely a matter of form in most proceedings.

2.3 The authors learned of the composition of the court and the name of the reporting judge (Francisco José Carrillo) only when the judgement was handed down, on 3 June 1996. The first author states that, if he had known the name of the reporting judge previously, he would have lodged an objection, as he had well-founded suspicions that the aforementioned judge had regularly been handing down judgements unfavourable to his clients since 1992, when the first author had publicly criticized in the press a judgement in penal proceedings in which the judge had participated. Since that time, Judge Carrillo has regularly handed down judgements against the first author in the appeals brought by the first author and at which he presided as reporting judge (a total of seven up to 1997).[1]

2.4 On 10 July 1996, the first author filed an application for *amparo* on his own behalf, and not representing the second author, before the second division of the Constitutional Court. In his application, he complained of the violation of the right to an impartial tribunal and a trial with all guarantees. He alleged that legislation is discriminatory because it allows a judge to disqualify himself when the lawyer is a member of his family but does not oblige the judge to disqualify himself when he is hostile towards one of the lawyers, nor in this last case does it enable the lawyer to request that the hostile judge be removed from the case.[2] The first author contended that the denial of a lawyer's right to challenge a judge would place the litigant or the party in an unequal position, since the rights and interests of the lawyer can also be affected by the participation of a hostile judge. The author also alleged that he had not been informed of the name of the reporting judge, which prevented him from exercising the right to challenge the judge on the basis of the right to an impartial tribunal.

2.5 In its decision of 29 September 1998, the Constitutional Court declared the appeal inadmissible. The second division considered that, with a minimum of diligence, the first author could have ascertained the composition of the division of the provincial court hearing the case and filed the appropriate motion for disqualification. The decision adds that the appeal hearing was held on 3 June 1996. At the hearing, the first author did not invoke the alleged violation of his basic rights, but awaited notification of the judgement in order to do so before the Constitutional Court. With regard to the merits, the Court concluded that the first author's application was clearly devoid of content, since the right to an impartial tribunal is a recognized right of the parties to the proceedings, and not of the lawyers who take on their defence, and the fact that the Judiciary Act does not include hostility towards a lawyer as one of the reasons for disqualification did not raise questions of constitutionality. The Court cited a previous decision handed down in another *amparo* action brought by the first author concerning the same question, in which it concluded that "on the assumption, which has not been demonstrated here, that such clear hostility existed, in accordance with the guarantees contained in article 24 of the Spanish Constitution the solution does not lie in the judge's removal from the case; rather, it is for the person subject to trial to decide whether or not it is appropriate to retain the defence lawyer that he has chosen. Impartiality involves the person who requests the protection of the law and not those who, cooperating with the justice system, represent and defend persons subject to trial".

2.6 On 26 October 1998, the first author requested before the plenary session of the Constitutional Court the annulment of the proceedings in the *amparo* application. In the first place, the author argued that he had not had an opportunity to acquaint himself with the allegations of the public prosecutor, nor to deny them. In the second place, he alleged that the judges of the second division of the Constitutional Court, whose dismissal the first author had already requested in connection with another case, lacked impartiality. In a decision of 10 November 1998, the first section of the first division of the Constitutional Court rejected the author's claims.

2.7 The first author submitted a complaint to the European Court of Human Rights. On 5 October 2000, the European Court declared the complaint inadmissible *ratione personae*, since it deemed that the author could not be considered to be directly affected by the violations that he alleged on his own behalf, and not on behalf of his client, in proceedings in which he had not taken part, since he participated in them only as the legal representative of his client. The authors allege before the Committee that the present communication is different from the case examined by the European Court, for two reasons: first, the second author did not apply to the European Court; secondly, the Court did not recognize the first author's right to bring an action and dismissed the application without considering the case on the merits. It therefore cannot be considered that the case was examined in the meaning of article 5, paragraph 2 (a), of the Optional Protocol.

2.8 The file that the authors submitted to the Committee contains a copy of the application to the European Court. In it, the first author, who is the applicant, includes a paragraph 8 bis, which reads: "My client, Mr. Francisco Morote Vidal, associates himself with the application submitted to Strasbourg through the attached document." The copy of the attached document was not submitted to the Committee. The issues raised in the application included violation of the right to an impartial tribunal and the right of a lawyer disadvantaged by the action of a hostile judge to have access to justice; discrimination that calls for the withdrawal of a judge when he is hostile to a party to the proceedings but not when he is hostile to a lawyer; and violation of the right to adversarial proceedings before the Constitutional Court.

The complaint

3.1 Both authors allege that the State party violated their right to an impartial tribunal and the right of access to justice (article 14, paragraph 1, of the Covenant). These rights were violated by the decision of the second division of the Constitutional Court, according to which, when there is manifest hostility between a lawyer for one party and the judge hearing the case, "in accordance with the guarantees contained in article 24 of the Spanish Constitution the solution does not lie in the judge's removal from case; rather, it is for the person subject to trial to decide whether or not it is appropriate to retain the defence lawyer that he has chosen. Impartiality involves the person who requests the protection of the law and not those who, cooperating with the justice system, represent and defend persons subject to trial". The right of access to justice is impaired when a lawyer's right to defend himself in any way against a hostile judge is not recognized.

3.2 The authors allege the violation of the right to equal access to justice (article 26 in conjunction with article 14, paragraph 1, of the Covenant). The partiality of a judge resulting from his hostility to a lawyer for one party affects both the party and his representative. The failure to recognize access to the challenge procedure for a lawyer who has a direct interest in removing a judge suspected of being partial against him constitutes discriminatory treatment with respect to the party, which is incompatible with the provisions of article 26 of the Covenant. Furthermore, discriminatory treatment exists because Spanish law allows the disqualification of a judge when he is related by family to a lawyer of one of the parties, but not because of manifest hostility between a judge and a lawyer for one of the parties.

3.3 The first author alleges that his right to adversarial proceedings before the Constitutional Court has been violated (article 14, paragraph 1, of the Covenant), owing to the fact that the first author did not have an opportunity, during the *amparo* proceedings, to acquaint himself with the allegations of the prosecution, which objected to the admissibility of the appeal, nor to reply to them.

Observations of the State party concerning admissibility and comments of the authors

4.1 In its observations of 19 January 2005, the State party maintains that the communication should be considered inadmissible. With regard to the identity of the reporting judge in the appeal before the provincial high court, the State party asserts that the first author was aware of the appointment of the judge. In this regard, the State party attaches a copy of a document of the provincial high court dated 11 October 1995 that refers to the beginning of appeal proceedings and contains the name of Judge Carrillo as reporting judge in the proceedings. Moreover, in the oral proceedings in the appeal, held on 3 June 1996, the first author did not lodge any complaint regarding the composition of the court or the participation of Judge Carrillo. Even if the first author had not been aware of the identity of the reporting judge, he could have filed challenge proceedings, since he was aware of the composition of the section. On the other hand, the fact that the first author did not know which judge would be the reporting judge is irrelevant, since the requirement of impartiality does not affect only, nor even principally, the reporting judge but affects all judges in the section equally, when a collegial decision is involved. The State party therefore concludes that the communication should be declared inadmissible in accordance with article 5, paragraph 2 (b), of the Optional Protocol.

4.2 The State party adds that it is difficult for someone to claim to be a victim when that person has not brought a complaint before the domestic courts, whether it be the party that is not affected by the judge's alleged "hostility" or, in his personal capacity, the lawyer acting in the party's defence, who has no legal grounds for any challenge.

4.3 The authors do not adduce objective data in support of the alleged hostility of the reporting judge; the assessments they make are purely subjective. For this reason, the State party invokes the grounds for inadmissibility contained in article 3 of the Optional Protocol.

4.4 The State party does not consider it admissible that the mere existence of a number of judgements unfavourable to a lawyer's other clients should oblige a judge to abstain from hearing a new case in which the same lawyer participates. Such a criterion would have the unacceptable consequence of making the composition of courts dependent on the whim and discretion of the party, simply because the lawyer has had better or worse luck in previous cases. The State party explains the reasons for which the law considers kinship alone as grounds for the abstention and disqualification of judges in relations with lawyers and prosecutors. The State party concludes that there is no reason for challenge proceedings, and invokes article 3 of the Optional Protocol as grounds for the inadmissibility of the communication.

4.5 Equal treatment in the regulation of the grounds for abstention and disqualification of the parties and their lawyers is not only not required by the principle of equality but is clearly an ill-advised means of ensuring the impartiality of the courts. The situations of the party and the lawyer are clearly different, and the difference in legal treatment is fully justified. Consequently, also with regard to the alleged violation of article 14, paragraph 1, and article 26 of the Covenant, the communication is unfounded in accordance with article 3 of the Optional Protocol.

4.6 It should also be pointed out that the "same case" submitted to the Committee was brought before the European Court of Human Rights, which declared it inadmissible. The State party recalls the Committee's jurisprudence concerning Spain's reservation to article 5, paragraph 2 (a), of the Optional Protocol, and requests the Committee to declare the communication inadmissible in accordance with that jurisprudence.

4.7 Lastly, the State party asserts that the present communication, which was submitted to the Committee in August 2002, refers to an alleged violation of the Covenant that is claimed to have occurred in June 1996 and on which the domestic courts ruled in September 1997 and September 1998. The fact that the authors waited four years to submit the case to the Committee renders the complaints contained therein frivolous and the communication an abuse in the meaning of article 3 of the Optional Protocol.

5.1 In their comments of 11 April 2005, the authors claim, with respect to the failure to exhaust domestic remedies, that, according to the Committee's jurisprudence, remedies that are clearly useless are not necessary. The Constitutional Court recognized that the challenge would have been useless when, in its decision declaring the *amparo* application inadmissible, it stated: "With regard to the merits, the present application is clearly devoid of content … in the sense that the basic right to an impartial tribunal is a recognized right of the parties to the proceedings and not of the lawyers who take on their defence." Moreover, since the Constitutional Court considered the merits of the case in order to dismiss the complaint, domestic remedies were exhausted.

5.2 With regard to the abuse of rights invoked by the State party, the authors point out that the Optional Protocol does not set a time limit for the submission of a communication, and that the facts occurred after Spain's ratification of the Covenant and the Optional Protocol. Therefore, the mere fact that the submission of a communication is delayed does not constitute an abuse of rights.

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The authors allege that the State party violated their right to an impartial tribunal and the right of access to justice owing to the fact that it was impossible for someone who served as a lawyer in a case to challenge a judge who acted in a hostile manner towards him, which had detrimental consequences for the lawyer's client. They also allege a violation of their right to equal access to justice, since the right to challenge a judge is granted to the parties to the proceedings but not to the parties' lawyers. The first author further alleges a violation of his right to adversarial proceedings before the Constitutional Court.

6.3 The Committee takes note of the State party's observation that the document of the provincial high court dated 11 October 1995 that refers to the beginning of appeal proceedings contains the name of Judge Carrillo as reporting judge in the proceedings. Moreover, in the oral proceedings in the appeal, held on 3 June 1996, the first author did not lodge any complaint regarding the composition of the court or the participation of Judge Carrillo. The State party adds that even if the first author had not been aware of the identity of the reporting judge, he could have filed challenge proceedings, since he was aware of the composition of the division. The Committee also notes that the Constitutional Court, in its decision of 29 September 1998, found that, with a minimum of diligence, the first author could have ascertained the composition of the division of the provincial court and filed the appropriate motion for disqualification. As for the second author, the Committee notes that he did not raise the issue of the alleged hostility of the competent judge in the case towards his counsel at any stage of the proceedings. He did not even lodge an *amparo* application on this issue in the Constitutional Court. In these circumstances, the Committee concludes that the authors did not exhaust domestic remedies.[3]

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the authors.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] The author provides information concerning each case. He states that, in two cases, his clients were sentenced after having been acquitted in a court of first instance. He also states that on 15 April 1997 he challenged Judge Carrillo in an appeal relating to another case, and that the challenge was declared inadmissible.

[2] In his appeal, the author cited the *Piersak* case decided by the European Court of Human Rights.

[3] See, for example, communication No. 536/1993, *Perera v. Australia*, decision adopted on 28 March 1995, para. 6.5.

CC. Communication No. 1329-1330/2004, *Pérez Munuera and Hernández Mateo v. Spain* (Decision adopted on 25 July 2005, eighty-fourth session)*

Submitted by:	José Pérez Munuera and Antonio Hernández Mateo (represented by counsel, José Luis Mazón Costa)
Alleged victim:	The authors
State party:	Spain
Date of communication:	7 October 2002 and 7 April 2003
Subject matter:	Equality of arms in connection with opportunities to question defence experts in criminal proceedings
Procedural issues:	Failure to substantiate the alleged violation
Substantive issues:	---
Articles of the Covenant:	14, paragraphs 1 and 3 (e)
Article of the Optional Protocol:	2

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 July 2005,

Adopts the following:

Decision on admissibility

1.1 The present case refers to two communications against Spain in connection with the same events. The author of communication No. 1329/2004 (first communication), dated 7 October 2002, is José Pérez Munuera, a Spanish national, born in 1957. The author of communication No. 1330/2004 (second communication), dated 7 April 2003, is Antonio Hernández Mateo, a Spanish national, born in 1940. The authors claim a violation by Spain of article 14 of the Covenant. The Optional Protocol to the Covenant entered into force for the State party on 25 April 1985. The authors are represented by counsel, José Luis Mazón Costa.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

1.2 On 31 January 2005 the Special Rapporteur on new communications and interim measures, acting on behalf of the Committee, acceded to the State party's request that the admissibility of the communication should be considered separately from the merits.

1.3 Under rule 94 of its rules of procedure, the Committee has decided to consider the two communications together.

Factual background

2.1 Mr. Hernández was the owner of a construction company that engaged in the building and refurbishment of dwellings. In January 1998 he instructed his employee, Mr. Pérez Munuera, to fill out two forms, which were later used to terminate the contract of employment of an Algerian citizen, Abdelkader Boudjefna, while he was on vacation in Algeria. Mr. Hernández relied on these documents in subsequent proceedings for unfair dismissal brought against him by Mr. Boudjefna. Mr. Boudjefna subsequently brought a criminal action against the authors for forgery.

2.2 On 10 February 2000 the authors were convicted by Murcia Criminal Court for involvement in the preparation of two documents terminating Mr. Boudjefna's current employment, without his consent, and, in the case of Mr. Hernández, for having made use of them subsequently in a trial. In the first document Mr. Boudjefna said that he had received 100,000 pesetas in compensation, and in the second document supposedly conveyed his desire to terminate his contract. The judgement stated that the signatures on the documents, forgeries of Mr. Boudjefna's signature, had been written by one of the two accused or by another individual at their instigation. Mr. Hernández was convicted for submission of forged documents in the proceedings together with an ongoing offence of misrepresentation, and was sentenced to 22 months' imprisonment. Mr. Pérez Munuera was convicted, as the author of the forgery of a private document, to 16 months' imprisonment. Mr. Hernández maintained throughout that he bore no responsibility whatsoever for the forgery of the signature. Mr. Pérez Munuera volunteered that he had drafted the documents on the order of his employer but stated that he had not forged Mr. Boudjefna's signature. The experts for the prosecution stated in their report that the complainant, Mr. Boudjefna, was not the author of the signature on the two documents, and that it was not possible for them to determine who was the author of the signatures on the documents; they concluded that the signatures had been written by one of the accused or by another individual at their instigation. The experts who appeared in the proceedings at the request of the authors found that the signature appearing on the documents was indeed that of Mr. Boudjefna.

2.3 The judge based his conviction on the report of the experts for the prosecution but did not hear the experts for the defence, citing lack of time. The prosecutors were allowed to put questions to the prosecution experts, but the defence was not allowed to question the defence experts, who were merely permitted to confirm their reports. In the record of the proceedings, which was not verbatim, there is no mention of the judge's refusal. The lack of opportunity to question the defence experts was noted in the appeal, but the Murcia Provincial Court, in its judgement of 26 April 2000, found that the alleged limitations on the questioning had not in any way impaired the defence presented by the defendants since the experts had submitted their reports in writing and had confirmed them during the proceedings. The court found that counsel for the defence had not formulated in writing the questions to be put to the experts, and that the decisive factor was that the experts had confirmed their reports during the proceedings, clarifications being "quite superfluous". The authors filed an appeal before the Constitutional Court for *amparo*, claiming a violation of the principle of equality of arms. On 16 October 2000 the Constitutional Court rejected the appeal. The Court found that the authors had not sufficiently demonstrated that questioning the experts was essential to their defence, since defence counsel had not prepared in writing the clarifications and observations sought.

2.4 The authors claim that they did not enjoy the basic guarantees of a criminal trial, such as the preparation of a verbatim record, which impaired the effectiveness of their right of appeal. The record failed to reflect the judge's refusal to allow the defence to question the defence experts.

2.5 The Criminal Procedure Act, in its article 790.1, grants prosecutors advantages in terms of investigation that are not granted to the defence. Making use of this privilege, the prosecutor asked one of the authors to give a statement as a defendant. This article of the Act was found to be in accordance with the Constitution by the Constitutional Court on 15 November 1990.

The complaint

3.1 The authors claim that they were convicted without there being any proof of their involvement in the forgery of Mr. Boudjefna's signature, in a violation of their right to the presumption of innocence, set forth in article 14, paragraph 2, of the Covenant. There being no proof of who had written the signatures, the element of doubt favoured the authors. The burden of proof lay with the prosecution, and it was not for the defendants to prove their innocence. In the case of Mr. Pérez Munuera, the only evidence against him was his own statement as a defendant, in which he acknowledged that on the orders of Mr. Hernández he had prepared two documents, one relating to termination of the contract of employment and the other to a financial settlement. As a subsidiary point, the authors also consider that the State party violated article 14, paragraph 1, in that their conviction on the basis of insufficient evidence also infringes the principle of due process.

3.2 The authors allege a violation of article 14, paragraph 3 (e), of the Covenant, given that there was unequal treatment in the questioning of the experts for the prosecution and the experts for the defence. The judge listened to the prosecution experts for more than an hour, but, when the turn of the defence experts came, he merely allowed them to endorse their reports, and denied the defendants' counsel the right to freely question the defence experts. Both the provincial court and the Constitutional Court restricted the right of the defence to question the experts to the submission by the defence in writing of the questions that it was proposed to put and to the questions being relevant. Such restriction lacks any legal basis. According to the authors, the fact that the provincial court concluded that the questions which their defence counsel proposed to put to the defence experts were superfluous means that the court acknowledged that there had been no equality in the questioning of the defence experts.

3.3 The authors also allege a violation of article 14, paragraph 1, since there was no verbatim record of the proceedings reflecting the constraints placed on the questioning of the defence experts. This is a general practice supported by the law, and, as such, was not raised before the Constitutional Court, given that there was no prospect of a successful outcome.

3.4 The authors also claim a violation of article 14, paragraph 1, of the Covenant, since there is a regulation in the Criminal Procedure Act which discriminates between prosecutors and defendants, permitting the prosecutor to request additional investigation proceedings at the conclusion of the investigation phase, a right which defendants are denied. This peculiarity arises in summary criminal proceedings. The prosecutor made use of this privilege to request, as an additional proceeding, the taking of a statement from one of the authors as a defendant.

State party's observations on admissibility

4.1 The State party claims that the communication is inadmissible as it is incompatible with the provisions of the Covenant and constitutes an abuse of the right to submit communications. The State party indicates that the authors' principal complaint relates to the supposed inability of the defence to question its experts during the oral proceedings, the remainder of the complaints being subsidiary, and adds that the authors' assertions are flatly contradicted by the record of the oral proceedings. The record of the oral proceedings is a document indicating what took place during the hearings and is validated by the signature and seal of the secretary of the court, who certifies the record of the oral proceedings.

4.2 Under article 788.6 of the Criminal Procedure Act, the records must reflect the essential content of the evidence examined, its impact and the claims to which it gives rise, and the decisions adopted. The State party indicates that the record was signed by counsel for the defence, without his raising any objection. This contradicts the assertion by the authors that the court supposedly acknowledged the lack of equality in the questioning of the defence experts. The State party adds that the expert reports submitted by the authors were incorporated into the proceedings and endorsed in the oral hearings, without the authors having indicated, either before the domestic courts or before the Committee, what additional clarifications they sought. The State party indicates that the appeal court noted in its judgement that the authors had not specified what observations or clarifications were of interest to them, and that the experts selected by the authors attended the trial and were able to confirm their reports in person. The court also indicated that the record reflected "the various and extensive questions put by the defence, and, as a result, the full opportunities available to make arguments".

4.3 The State party concludes that the attack (sic) by the authors impugning the authenticity of the record, without offering any evidence, is incompatible with article 14 of the Covenant and with the requirement for proceedings to be public, this having been observed in the case of the authors, bearing in mind that the record of the oral proceedings is signed and sealed by the secretary of the court, who certifies the record. The State party also maintains that the authors' complaint constitutes an abuse of the right to submit communications because: it contradicts a public document which provides an authentic record of the oral proceedings in the trial and which was signed without objection by the authors' defence counsel; it alleges events that were not specified or proven in domestic appeals; and it refers to events that took place almost six years earlier and in respect of which there was a final judgement by the Constitutional Court in October 2000, there being a manifest delay in the submission of the communication.

Authors' comments on the State party's observations

5.1 According to the authors it is inapposite for the State party to have affirmed that the record of the oral proceedings was complete or verbatim and not a summary record. Mere observation of the record suggests that it is in fact a summary. The summary nature of the record is expressly provided for by article 743 of the Criminal Procedure Act. According to the authors, the State party's observations contradict Spanish domestic legislation and reflect a lack of good faith by the State party. They note that in the application to the Constitutional Court for *amparo* they claimed that the lack of a verbatim record resulted in an absence of legal guarantees. They add that it was discriminatory for the State party not to ensure a verbatim record in criminal proceedings while so doing in civil proceedings, as acknowledged in Act No. 1/2000 of 7 January 2000. They consider that the absence of a verbatim record violates the right to due process in accordance with article 14, paragraph 1, of the Covenant.

5.2 The authors add that, when the appeal court stated that the authors' counsel had not formulated the observations or allegations that they wished to put to the experts in the oral proceedings and that such clarifications were quite superfluous, it acknowledged that there were constraints on the right to question the defence experts[1].

5.3 The authors specify that the four handwriting experts, two for the prosecution and two for the defence, were all summoned to attend the hearings by the judge, that is to say, the experts for the defence were present when the experts for the prosecution were questioned. They add that questioning of a prosecution expert by the prosecutor and by the defence counsel began, but the judge allowed the defence experts to comment on the testimony of the prosecution experts although it was not their turn to be questioned. The prosecution experts having testified for approximately an hour, once it was the turn of the defence experts to testify, the judge, immediately after they had confirmed their reports and made short statements, interrupted the questioning, stating that there was no more time. The questions that the defence counsel intended to put were related to the subject matter of the testimony.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a), of the Optional Protocol.

6.3 The Committee notes the authors' complaint that Spanish criminal procedure legislation allows the prosecutor the option of requesting additional investigation proceedings after the investigation phase has concluded. Nevertheless, the authors have not explained what specific harm was caused to them by the fact that the prosecutor made such a request once the investigation had concluded. Accordingly, the Committee concludes that the authors may not consider themselves victims within the meaning of article 1 of the Optional Protocol in respect of the aforementioned complaint and finds this part of the communications submitted by the authors inadmissible in accordance with article 1 of the Optional Protocol.

6.4 In connection with the authors' complaint that they were convicted on the basis of insufficient evidence against them, the Committee recalls its jurisprudence to the effect that it is in principle for the courts of States parties to evaluate the facts and evidence, unless the evaluation of the facts and evidence was manifestly arbitrary or amounted to a denial of justice, circumstances that do not obtain in the case of the authors. The Committee notes that the copy of the record of the proceedings submitted by the authors contains the following: testimony by one of the defence experts in response to questions from the prosecution; a section on questions by the defence to one of the prosecution experts; a further section on questions from the defence to the expert appointed by the court; and another on questions by the defence to a defence expert and the corresponding reply. The Committee also notes, from the copy of the judgement in first instance submitted by the authors, that the evidence against them did not consist only of expert reports. The Committee considers, accordingly, that the authors have not sufficiently substantiated the other complaints under article 14, paragraph 1, of the Covenant for the purposes of admissibility and finds that the communications are inadmissible under article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) That the communications are inadmissible under articles 1 and 2 of the Optional Protocol;

(b) That this decision shall be communicated to the State party, to the authors of the communications and to their counsel.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Note

[1] The authors cite the Committee's decision in respect of communication No. 526/1993, *Hill v. Spain*, of 2 April 1997, para. 14.2. They indicate that in this case the Committee found admissible a complaint by one of the authors although the record of the proceedings did not reflect the specific request by Mr. Michael Hill to conduct his own defence through an interpreter.

DD. Communication No. 1333/2004, *Calvet v. Spain* (Decision adopted on 25 July 2005, eighty-fourth session)*

Submitted by:	Liberto Calvet Ràfols (represented by counsel, Miquel Nadal Borràs)
Alleged victim:	The author
State party:	Spain
Date of communication:	18 December 2002 (initial submission)
Subject matter:	Prohibition on imprisonment for inability to fulfil a contractual obligation
Procedural issues:	Inadmissibility *ratione materiae*
Substantive issues:	---
Article of the Covenant	11
Articles of the Optional Protocol:	1 and 3

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 July 2005,

Adopts the following:

Decision on admissibility

1.1 The author of the communication, which is dated 18 December 2002, is Liberto Calvet Ràfols, a Spanish national resident in Vilanova i la Geltrú, Barcelona. The author alleges a violation by Spain of article 11 of the Covenant. The Optional Protocol entered into force in the State party on 25 April 1985. The author is represented by counsel, Miquel Nadal Borràs.

1.2 On 17 February 2005, the Special Rapporteur on new communications and interim measures, acting on behalf of the Committee, agreed to the State party's request to separate the consideration of the admissibility and merits of the communication, in accordance with rule 97, paragraph 3, of the Committee's rules of procedure.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Factual background

2.1 The author and his wife concluded an agreement dissolving their marriage, and this was approved by the court in February 1990. Following submission of an application for divorce by the author's ex-wife, court No. 4 in Vilanova i la Geltrú, in a ruling dated 7 March 1992, awarded the mother care and custody of the couple's minor daughter and ordered the author to pay his ex-wife the sum of 25,000 pesetas (150.28 euros) per month in maintenance. On 27 October 1995, the author's ex-wife submitted to examining magistrate No. 6 in Vilanova i la Geltrú a claim for recovery of three monthly payments outstanding from 1993, two from 1994 and all payments from 1995.

2.2 On 14 March 2001, criminal court No. 12 in Barcelona found the author guilty of the offence of abandonment of the family under article 227 of the Spanish Criminal Code and sentenced him to eight weekends' imprisonment and reimbursement of the sums owed to his ex-wife.

2.3 The author appealed, alleging, inter alia, a violation of the prohibition on imprisonment for inability to meet contractual obligations, as provided under article 11 of the Covenant, inasmuch as he had been sentenced to deprivation of liberty for allegedly failing to pay a debt. In a judgement dated 5 July 2001, the Barcelona Provincial Court upheld the earlier ruling, albeit limiting the payment to the amounts outstanding for the period from August 1994 to 27 October 1995, the date of submission of the complaint.

2.4 The author submitted an application for *amparo* to the Constitutional Court, again alleging a violation of article 11 of the Covenant inasmuch as he had been sentenced to imprisonment for alleged breach of a contractual obligation. He also claimed that article 227 of the Spanish Criminal Code was in itself a violation of article 11 of the Covenant. The Constitutional Court rejected both claims on the grounds (a) that maintenance payments are not a contractual but a legal obligation; and (b) that article 227 of the Criminal Code provides not for imprisonment for debt, but for punishment for an act defined in law as an offence and consisting in the failure to fulfil the legal obligation to care and provide for one's family.

The complaint

3.1 The author alleges a violation of the prohibition, under article 11 of the Covenant, on imprisonment for inability to meet contractual obligations, insofar as he was sentenced to deprivation of liberty for a debt he had failed to pay solely for lack of financial resources and not by deliberate intent.

3.2 The author also claims that article 227 of the Criminal Code itself violates article 11 of the Covenant insofar as it provides for deprivation of liberty for non-payment of maintenance.

State party's submissions on the admissibility of the communication, and author's comments

4.1 The State party argues that the communication is inadmissible because it manifestly lacks any basis in article 11 of the Covenant, the sentence having been passed on the author on the grounds not of his failure to meet a contractual obligation but of his failure to fulfil his legal obligation to keep and feed his family. It further states that the fact that this obligation was contained in a document conveying an agreement between the parties does not make the obligation a contractual one, for the obligation itself derives not from that agreement but from the legal obligation on parents to support their children at all times, and on spouses to support each other during the marriage, and even following dissolution if one partner is left without means. Consequently, the basis for the author's conviction was not contractual but legal.

4.2 As to the alleged inconsistency of article 227 of the Criminal Code with article 11 of the Covenant, the State party notes that the former provides for imprisonment not for debt but for abandonment of one's dependent family, i.e., on grounds deriving not from a contractual agreement but from a legal requirement.

5.1 In a letter dated 4 April 2005, the author points out that article 227 of the Criminal Code was amended by Fundamental Law No. 15/2003, which entered into force on 1 October 2004, replacing the previous penalty of 8 to 20 weekends' detention by the current sentence of three months' to one year's imprisonment or a 6- to 24-months' fine.

5.2 The author insists that the inability to pay maintenance constitutes a failure to fulfil a contractual obligation that derives from the contract signed by the two spouses, i.e., the agreement reached at the time of their separation or divorce. In his view, then, the obligation is contractual, albeit one ratified by the court.

5.3 Lastly, the author argues that all contractual obligations are legal obligations since all juridical relations between persons are regulated by law.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant on Civil and Political Rights.

6.2 The Committee has ascertained, as it is required to do under article 5, paragraph 2 (a), of the Optional Protocol, that the case is not under examination by another instance of international investigation or settlement.

6.3 The Committee has also ascertained that the author has exhausted domestic remedies, as required under article 5, paragraph 2 (b), of the Optional Protocol.

6.4 With regard to the alleged violation of article 11 of the Covenant by the imposition of a custodial sentence for failure to pay maintenance, the Committee notes that the case concerns a failure to meet not a contractual obligation but a legal obligation, as provided in article 227 of the Spanish Criminal Code. The obligation to pay maintenance is one deriving from Spanish law and not from the separation or divorce agreement signed by the author and his ex-wife. Consequently, the Committee finds the communication incompatible *ratione materiae* with article 11 of the Covenant and thus inadmissible under article 3 of the Optional Protocol.

6.5 In light of the foregoing, it is not, in the Committee's opinion, appropriate for it to consider *in abstracto* the compatibility of article 227 of the Criminal Code with article 11 of the Covenant. The author's complaint in this regard amounts to an *actio popularis* and, as such, the Committee finds it inadmissible under article 1 of the Optional Protocol.

7. Consequently, the Committee decides:

(a) That the communication is inadmissible under articles 1 and 3 of the Optional Protocol;

(b) That this decision shall be communicated to the author of the communication and to the State party.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

EE. Communication No. 1336/2004, *Chung v. Australia* (Decision adopted on 25 July 2005, eighty-fourth session)*

Submitted by:	Mr. Yo Han Chung (not represented by counsel)
Alleged victim:	The author
State party:	Australia
Date of communication:	8 June 2003 (initial submission)
Subject matter:	Exclusion from University
Procedural issues:	Inadmissibility *ratione materiae*
Substantive issues:	Right to study
Articles of the Covenant:	1, 2, 5, 6, 7, 9, 10, 14, 17, 18, 19, 20, 22, 25 and 26
Articles of the Optional Protocol:	2 and 3

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 July 2005,

Adopts the following:

Decision on admissibility

1. The author of the communication, initially dated 8 June 2003, is Yo Han Chung, a Korean citizen born in 1971, who immigrated to Australia[1] with his family in 1990. He claims to be a victim of violations by Australia of articles 1, 2, 5, 6, 7, 9, 10, 14, 17, 18, 19, 20, 22, 25 and 26 of the International Covenant on Civil and Political Rights (the Covenant). He is not represented by counsel.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Sir Nigel Rodley, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Pursuant to rule 90 of the Committee's rules of procedure, Committee member Mr. Ivan Shearer did not participate in the adoption of the present Views.

Factual background

2.1 The author enrolled in a Bachelor of Applied Science (Physiotherapy) course at the University of Sydney in 1993. Subsequently, he was diagnosed with anxiety and major depression.

2.2 In 1999, as the author was encountering difficulties in the course, several meetings took place between him and University authorities to design a programme and workload adapted to his mental health and anxiety. However, he failed a few subjects, and complained about the grades to various authorities, and requested to have access to his exam papers. By letter of 6 March 2000, the author was informed that he had been excluded from the course of Physiotherapy for a period of two years, for failure to show good cause why he should be allowed to re-enrol in the course.

2.3 On 4 September 2000, the author filed a complaint with the Human Rights and Equal Opportunity Commission claiming that the University, in excluding him, had discriminated against him on the grounds of race and disability. The author's complaint was terminated on 20 March 2001 for lack of substance.

2.4 On 10 April 2001, the author brought proceedings under the Human Rights and Equal Opportunity Commission Act 1986 with respect to complaints of race and disability discrimination, before the Federal Court of Australia. The matter was transferred to the Federal Magistrates Court, which summarily dismissed the claim on 20 September 2001, on the basis that it disclosed no reasonable cause of action.

2.5 On 3 October 2001, the author requested leave to appeal to the Full Court of the Federal Court but it was denied on 21 February 2002. A request for special leave to appeal to the High Court was denied on 5 November 2002.

The complaint

3.1 The author claims to be a victim of a violation of articles 1, 2, 5, 7, 9, 17, 19 and 25 of the Covenant, because the University of Sydney entered a fail grade in his Cardiopulmonary 2 exam causing him a "mental shock", and because the University authorities sent him a "threat letter" informing him that he could not enrol in Clinical Education 1A in 1999, which "repeated the mental shock".

3.2 The author claims to be a victim of a violation of articles 1, 2, 5, 7, 9, 10, paragraph 1, 17, 19, paragraph 1, 20, paragraph 2, 25 and 26 of the Covenant, in that the dean of the school did not change his exam result and excluded the author from school, despite a warning that the author might commit suicide.

3.3 He further alleges violations of articles 1, 2, 5, 7, 9, 10, 14, 17, 18, 19, 25 and 26 of the Covenant, because documents were allegedly forged during his Human Rights Commission investigation and because his language skills were monitored in school, restricting his self-determination to choose a study and occupation.

3.4 He claims to be a victim of a violation of articles 1, 2, 5, 7, 9, 14, 17, 20, 22, 25 and 26 of the Covenant, because the Human Rights Commission, the Police Commissioner and the Education Minister did not ensure the enforcement of the law and the protection of his human rights.

3.5 Lastly, the author alleges a violation of articles 1, 2, 5, 7, 9, 10, paragraph 1, 14, paragraph 1 and 6, 17, 19, 20, 25 and 26 in that evidence was tampered within the federal proceedings, that the respondents did not produce requested evidence and that the judge did not "follow justice".

Issues and proceedings before the Committee

Consideration of admissibility

4.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

4.2 The Committee considers that the author's claims under articles 1, 2, 5, 6, 7, 9, 10, 14, 17, 18, 19, 20, 22, 25 and 26 of the Covenant either fall outside of the scope of those provisions or have not been substantiated, for purposes of admissibility. Consequently, the author's claims are inadmissible under articles 2 and 3 of the Optional Protocol.

5. Accordingly, the Committee decides:

(a) That the communication is inadmissible under articles 2 and 3 of the Optional Protocol;

(b) That this decision shall be transmitted to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Note

[1] The International Covenant on Civil and Political Rights entered into force for the State party on 13 November 1980 and its Optional Protocol on 25 December 1991.

FF. Communication No. 1356/2005, *Parra Corral v. Spain* (Decision adopted on 29 March 2005, eighty-third session)*

Submitted by:	Mr. Antonio Parra Corral (represented by counsel Mrs. Encarnación Caballero Oliver.)
Alleged victim:	The author
State party:	Spain
Date of communication:	12 December 2004 (initial submission)
Subject matter:	Extent of the review on appeal by Spanish courts
Procedural issues:	Non- exhaustion of domestic remedies, failure to substantiate claims
Substantive issues:	Right to have the sentence and conviction reviewed by a higher tribunal according to law
Articles of the Covenant:	14, paragraph 5, and 26
Articles of the Optional Protocol:	2 and 5, paragraph 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 29 March 2005,

Adopts the following:

Decision on admissibility

1. The author of the communication dated 12 December 2004 is Antonio Parra Corral, a Spanish citizen born in 1945. He claims to be a victim of violations by Spain to article 14, paragraph 5, and article 26 of the Covenant. The Optional Protocol entered into force for Spain on 25 April 1985. The author is represented by counsel (Mrs. Encarnación Caballero Oliver).

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen and Mr. Roman Wieruszewski.

Factual background

2.1 On 9 December 2001 the Second Chamber of the Provincial Court of Almería (*Audiencia Provincial de Almería*) sentenced the author to seven and a half years of imprisonment for destruction of property, attempt to commit homicide and manufacturing of illegal explosives, and to one year imprisonment for continuous threats.[1]

2.2 The author filed an appeal in the Supreme Court (*Tribunal Supremo*) alleging violations of procedural guarantees and substantive rights. On 12 September 2002, the Supreme Court declared the appeal inadmissible. The author then appealed (*amparo*) to the Constitutional Court (*Tribunal Constitucional*), which dismissed his appeal on 20 October 2004.

The complaint

3.1 The author's complaint concerns primarily the right to an effective appeal against conviction and sentence. He argues that the Spanish Criminal Procedure Act (*Ley de Enjuiciamiento Criminal*) violates articles 14, paragraph 5, and 26 of the Covenant because those charged with the most serious crimes have their cases heard by a single judge (*Juzgado de Instrucción*) who conducts all the pertinent investigations and, once he considers the case ready for trial, refers it to the Provincial Court (*Audiencia Provincial*), where a panel of three judges conducts the trial and decides the case. Their decision is subject to judicial review proceedings only on very limited legal grounds. There is no possibility of a re-evaluation of evidence by the Supreme Court, as all factual determinations by the lower court are considered final. By contrast, those convicted of less serious offences for which sentences of less than six years' imprisonment may be imposed have their cases investigated by a single judge (*Juzgado de Instrucción*) who, once the case is ready for trial, refers it to a single judge *ad quo* (*Juzgado de lo Penal*), whose decision may be appealed before the Provincial Court (*Audiencia Provincial*), thus ensuring an effective review not only of the application of the law. but also of the facts.

3.2 The author claims that, as the Supreme Court does not re-evaluate evidence, the Spanish system does not guarantee the right to have his conviction and sentence reviewed by a higher court according to law (article 14, paragraph 5, of the Covenant). According to the author, the Supreme Court dismissed the appeal on formal and procedural grounds, without having re-examined the weighing of the evidence by the lower court. In its judgement, the Constitutional Court stated that it was not in its remit to review the weighing of the evidence done by the trial court, or to review the conclusions of the Supreme Court.

Consideration of admissibility

4.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

4.2 The Committee recalls its jurisprudence according to which the requirement of exhaustion of domestic remedies, which allows the State party to remedy an alleged violation before the same issue is raised before the Committee, oblige authors to raise the substance of the issues submitted to the Committee before domestic courts. Noting that the author has failed to raise in substance before domestic courts the alleged violation of the principle of non-discrimination (article 14, paragraph 5, in conjunction with article 26 of the Covenant), the Committee decides that this part of the communication is inadmissible pursuant to article 5, paragraph 2 (b) of the Optional Protocol.

4.3 The Committee notes that the remaining allegation concerning article 14, paragraph 5 - the alleged failure of Spanish courts to re-examine the weighing of evidence - is contradicted by the text of the judgements of the Supreme Court and the Constitutional Court in the author's case. Both courts thoroughly addressed the author's allegation that circumstantial evidence was insufficient to convict him, and disagreed with his account, developing extensive arguments to conclude that the evidence, though circumstantial, was sufficient to warrant the author's conviction. In the present case, the Committee concludes the author has failed properly to substantiate his claim under article 14, paragraph 5, and decides that this part of the communication is inadmissible pursuant to article 2 of the Optional Protocol.

5. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible pursuant to articles 2 and 5, paragraph 2 of the Optional Protocol;

(b) That this decision shall be communicated to the author and, for information, to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Note

[1] According to the judgement, the author and a co-accused threatened a commercial partner who refused to transport livestock for them. They put a package with explosives in front of the victim's home and provoked an explosion, which caused severe damage to the premises. The evidence against the author consisted in testimonies about the threats and experts' affidavits on the type of explosives used by the accused and the extent of the damage caused to the victim's premises.

GG. Communication No. 1357/2005, *Kolyada v. The Russian Federation* (Decision adopted on 29 March 2005, eighty-third session)*

Submitted by:	A. K. (not represented by counsel)
Alleged victim:	The author
State party:	Russian Federation
Date of communication:	7 August 2004 (initial submission)
Subject matter:	Alleged unfair review of psychiatric assessment
Substantive issues:	Admissibility
Articles of the Covenant:	14 (1)
Articles of the Protocol:	5 (2) (a)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 29 March 2005,

Adopts the following:

Decision on admissibility

1. The author of the communication is Mr. A. K., a Russian citizen, born in 1960 and resident of the Russian Federation.[1] He claims to be a victim of a violation by the Russian Federation of article 14, paragraph 1, and article 2, paragraph 3. He is not represented by counsel.

Factual background

2.1 In 1979, the author was diagnosed as suffering from schizophrenia.
On 11 September 1989, he underwent a psychiatric examination at the Commission of the Chief Psychiatrist of the Russian Federation to review his condition. According to the author, the examining psychiatrist concluded that he suffered from an "acute schizophroidal psychosis", rather than actual schizophrenia; the psychiatrist told him that his new diagnosis would be

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen and Mr. Roman Wieruszewski.

formalized once she had obtained pertinent documents about the author's psychiatric history. However, the psychiatrist's formal conclusion on 8 January 1990 was that there were in fact no reasons to change the original diagnosis of 1979.

2.2 The author challenged this decision in the Preobrazhenski Municipal Court. He contended that all relevant medical documentation was available to the treating psychiatrist at the time of the psychiatric examination, and that her diagnosis that he suffered from the lesser affliction of "acute schizophroidal psychosis", rather than actual schizophrenia, was binding. He claimed that the psychiatrist had then unlawfully changed her finding, without any evidentiary basis, and wrongly concluded that he suffered from schizophrenia.

2.3 On 20 September 1994, the court held that the psychiatrist had acted within the limits of her authority and that there were no grounds to review her decision. The treating psychiatrist had explained, and the court had accepted, that the views she had formed about the author's condition at the end of the examination were provisional, and that she had to await the receipt of the author's psychiatric documentation before reaching her final conclusion. Upon receipt of the documents, she had concluded that there were in fact no grounds to change the original diagnosis.

2.4 The author's appeal to the Moscow City Court was dismissed on 6 December 1994; subsequent appeals to the Supreme Court of the Russian Federation were dismissed on 31 October 1995 and 13 March 1997 respectively.

The complaint

3.1 The author contends that his complaint about his diagnosis was not the subject of fair and impartial proceedings, and that the court's evaluation of the evidence regarding the events in question was arbitrary, resulting in a denial of justice, in violation of article 14, paragraph 1, of the Covenant. He also claims that he was not afforded a remedy for the violation of his Covenant rights, in breach of article 2, paragraph 3.

Issues and proceedings before the Committee

4.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with the rule 93 of its rules of procedure, decide whether or not the case is admissible under the Optional Protocol to the Covenant.

4.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

4.3 The Committee considers that the subject matter of the allegations in the author's communication relates in substance to the evaluation of facts and evidence in the course of proceedings before the State party's courts. The Committee recalls its jurisprudence and notes that it is generally not for itself, but for the courts of States parties, to review or to evaluate facts and evidence, or to examine the interpretation of domestic legislation by national courts and tribunals, unless it can be ascertained that the conduct of the trial or the evaluation of facts and evidence or interpretation of legislation was manifestly arbitrary or amounted to a denial of justice.[2] The material before the Committee does not indicate that the conduct of the judicial proceedings in the author's case suffered from such deficiencies. Accordingly, the Committee considers the author's claims under article 14, paragraphs 1 and 3, are inadmissible under article 2 of the Optional Protocol.

5. The Committee therefore decides that:

(a) The communication is inadmissible pursuant to article 2 of the Optional Protocol;

(b) This decision will be transmitted to the author and, for information, to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] The Optional Protocol entered into force for the Russian Federation on 1 January 1992.

[2] See communication No. 541/1993, *Simms v. Jamaica*, inadmissibility decision of 3 April 1995.

HH. Communication No. 1371/2005, *Mariategui et al. v. Argentina* (Decision adopted on 26 July 2005, eighty-fourth session)*

Submitted by:	Eduardo Mariategui, Mirta Honorina Mattiusi de Mariategui, Francisco José Mariategui and Alicia Beatriz Fernández de Mariategui (not represented by counsel)
Alleged victim:	The authors
State party:	Argentina
Date of communication:	17 July 2002 (initial submission)
Subject matter:	Alleged failure to redress damages caused to owners of a company arising from the alleged violation of contracts for public works constructions
Procedural issues:	Author's lack of standing to submit a communication about company rights; domestic remedies instituted or pursued by a company
Substantive issues:	Right to equal treatment before the courts and tribunals, right to access to courts, right to have one's right determined without undue delay
Articles of the Covenant:	14 (1) and 26
Articles of the Optional Protocol:	1 and 5 (2) (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 26 July 2005,

Adopts the following:

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Sir Nigel Rodley, Mr. Ivan Shearer, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Pursuant to rule 90 of the Committee's rules of procedure, Committee member Mr. Hipólito Solari Yrigoyen did not participate in the adoption of the present Views.

Decision on admissibility

1. The authors of the communication (initial submission of 17 July 2002) are Eduardo Mariategui, Mirta Honorina Mattiusi de Mariategui, Francisco José Mariategui and Alicia Beatriz Fernández de Mariategui, all Argentinean citizens. They claim to be victims of violations by Argentina to articles 2, paragraphs 2 and 3, and articles 14 and 26 of the Covenant. They are not represented by counsel. The Optional Protocol entered into force for Argentina on 8 November 1986.

Factual background

2.1 The authors are the owners of the enterprise "Mariategui Sociedad Anónima Comercial Industrial Minera Agropecuaria Constructora" (referred to hereinafter as the company), which is a limited company created in 1976, and the legal successor of "Mariategui Usandizaga S.A.C.I.M.A.C. another limited company created by the two first authors in 1970. The company participated in take-over bids and became the contract-winning company for the construction of public works for provincial governments in Argentina. The authors allege that these authorities as well as the national government have failed to comply with the contracts for the past 35 years and are indebted to the company for 1.727.883.277.388.410.000.000 (!) United States dollars. The authors allege that they are the State's principal private creditors in Argentina.

2.2 *Public work for the Province of Neuquén, allegedly financed by the National Fund for Housing*: the contract for the execution of this public work was signed in March 1976. The costs of construction allegedly rose disproportionately, but the company finished the works in February 1977. On 9 February 1977, the authorities of the Province of Neuquén issued a provisional certificate acknowledging the receipt of the construction. On 17 May 1982, they issued a definitive certificate of acknowledgement. In November 1985, the company filed an administrative complaint with the Governor of the Province of Neuquén. In April 1986, the company filed a suit before the Arbitral Tribunal set out in Law 12.910. On 26 September 1987, the Arbitral Tribunal (*Tribunal Arbitral de Obras Públicas*) decided that it lacked jurisdiction to entertain the complaint. On 28 December 1990, the company filed an independent claim in the National Supreme Court of Justice (*Corte Suprema de Justicia de la Nación*), which in June 1992, decided that it lacked jurisdiction and that the complainant company should have filed its claim in the local courts established in the contract. In May 1993, the company sued the State of Argentina and the Province of Neuquén in the Superior Court of the Province of Neuquén. On 12 July 1994 the Superior Court decided that it had no jurisdiction to hear the case. On 3 February 1995, the Superior Court admitted the appeal filed by the company against the judgement of 12 July 1994. This appeal was dismissed by the Supreme Court of Justice, which considered that the complainant had not properly addressed the matter to the Court for Administrative Affairs of First Instance. On 4 July 1996, two years late, the company filed a complaint in the Court for Administrative Affairs of First Instance. In December 1997, the latter declared itself incompetent to handle the complaint and returned the case file to the Supreme Court. The authors allege that the Supreme Court of Justice "has done nothing" on their complaint from 1997 to the time of the submission of their complaint to the Committee.

2.3 *Bus station of Piedra de Aguila, Neuquén*: a contract was signed on 13 February 1976 between the Province of Neuquén and Mariategui & Usandizaga S.A.C.I.M.A.C, and funded by the National Fund for Transportation. Construction ended in September 1977.

The company considered that the costs for carrying out the work had risen disproportionately and, on 7 October 1988, filed and administrative claim against the Province of Neuquén, which was dismissed in 1989, for having been filed out of time. In June 1992, the company filed a separate suit in the National Supreme Court of Justice, against the National Government and that of the Province of Neuquén. By judgement of 24 September 1998, the National Supreme Court of Justice dismissed the suit against the National Government, finding that the latter could not be sued, because the evidence before the court was inconclusive as to whether the National Government had indeed participated in the allocation of funds from the National Fund for Transportation to the Province of Neuquén. The Court also decided that it lacked jurisdiction to entertain the complaint against the Province, based on the fact that, according to contractual terms, the ordinary courts of the Province were competent tribunals to hear the case.

2.4 *Extension of the telephonic centre of General Roca in the Province of Río Negro for the Argentinean National Telephonic Enterprise (ENTEL)*: the contract was signed on 12 September 1977 between ENTEL and Mariategui & Usandizaga S.A.C.I.M.A.C, and the work was finalized in November 1980. Due to an alleged failure from ENTEL to comply with the contract terms, the company filed an administrative claim against ENTEL in 1987, which was dismissed in May 1988. On 25 September 1989, the company filed a suit in the Court for Administrative Affaires of First Instance. While the proceedings were still pending, ENTEL was privatized. On 26 March 1991, the company filed a motion to link the buyers of ENTEL's assets to the proceedings. The purchasing companies (Telefónica Argentina and France Telecom S.A.) filed motions to disengage themselves from the proceedings. The motions were finally decided in October 1995 and March 1996, respectively. Apparently, the proceedings against the buyers are still pending.

2.5 *Works for the urban pavement of Municipality of Mercedes*: the contract was concluded between the Municipality and the first and the second authors in 1969. In 1970, the first author filed an administrative claim against the Municipality in the Supreme Court of the Province of Buenos Aires (*Suprema Corte de Justicia de la Provincia de Buenos Aires*). On 4 October 1977, the Court ruled for the plaintiff, sentenced the defendants to pay the true value of the works, and decided that the plaintiff should liquidate the debt. On 20 December 1977, the Supreme Court of the Province of Buenos Aires approved the liquidation of the debt made by the plaintiff and set in 160 millions of Argentinean pesos the amount that the defendant should pay. The court also ordered the plaintiff to calculate the interests of the debt. On 28 February 1978, the court ordered the defendants to pay 346.511.355 Argentinean pesos. On 28 March 1978, however, the court on its own decided to annul the previous liquidation and ordered a new one.
On 18 April 1978, however, the plaintiff and the defendant settled their dispute by signing an extrajudicial agreement, according to which the defendant would pay 300.000.000 Argentinean pesos to the plaintiff, a payment that was effected on 28 April 1978. On 4 June 1978, the Supreme Court of the Province of Buenos Aires approved the agreement concluded by the parties. On 29 June 1995, the first author filed a suit in the National Supreme Court of Justice against the National Government, the Government of the Province of Buenos Aires and the Municipality of Mercedes, for recovery of the damages allegedly inflicted on him by the judgement of the Supreme Court of the Province of Buenos Aires, which had allegedly made several mistakes when handing down its judgement of 4 October 1977 and thereafter in the process of liquidation of the debt. On 15 April 1996, the plaintiff and his wife transferred their rights in the lawsuit to Mariategui S.A.C.I.M.A.C. On 14 October 1999, the Supreme Court dismissed the claim, considering that it had not been filed within the statutory time limits.

2.6 The authors add that a complaint similar to the one submitted to the Committee was presented in March 1998 to the Inter-American Commission on Human Rights. On 21 October 1999, the Commission informed the authors that their case was inadmissible *ratione personae*, and that it could not review judicial decisions in which the alleged victim was not an individual but a company. The Commission added that domestic remedies were exhausted by the company and not by the authors themselves. The authors asked for the reconsideration of the decision taken by the Commission, but the latter dismissed their request. Afterwards, according to the authors, they learned that the former Executive Secretary and a former member of the Commission had "obstructed" the examination of their case, and they filed a complaint for corruption against them in the OAS General Assembly, which did not act on the matter.

2.7 On 4 July 2003, the Secretariat of the Human Rights Committee sent a letter to the authors, explaining to them that the Committee was unable to examine their complaint, because the former could not in principle review the facts and evidence evaluated by domestic courts and could only examine complaints submitted by individuals.

2.8 By submission of 3 February 2004, the authors informed that on 13 July 2003 they had filed a complaint in the International Criminal Court against Argentina for an alleged crime against humanity committed against them. The complaint was also filed against other OAS member states for their alleged conspiracy with Argentina. The authors have submitted similar complaints with the World Bank, the International Monetary Fund, and the Inter-American Development Bank.

2.9 By submission of 17 March 2004, the authors contend that Argentina continues to act in bad faith towards them. They explain that the President of the Republic had assured the IMF that the Argentinean Government would begin negotiations with private creditors from 22 March 2004 to 16 April 2004, but that they hardly believed in that promise.

2.10 On 21 May 2004, the authors informed the Committee that they consider the Secretariat's standard letter of 4 July 2003 to be null and void because of formal and substantive errors. They add that the content of the letter violates the United Nations Universal Declaration of Human Rights and the Covenant.

2.11 By submission of 1 November 2004, the authors inform that Argentinean authorities had approved the Administrative Decree on the Restructuring of National Debt of Private Creditors, and that they had appealed that regulation for being unconstitutional and illegal. They add that they had unsuccessfully attempted to have a meeting with the President of the Republic, and that the Supreme Court of Justice had again ruled that it lacks jurisdiction on their case.

2.12 By letters of 4 May, 27 May, and 4 November 2004, the Secretariat of the Committee reiterated to the authors that the initial complaint of July 2002 and their other submissions could not be examined by the Committee. The authors reply to these letters explaining that they consider them to be null and void due to alleged formal and substantive shortcomings.

2.13 By submission of 14 January 2005, the authors noted that on 10 December 2004, the Argentinean Government adopted a Decree proposing its private creditors an alternative to solve the problem of the internal debt. This Decree was published on 17 January 2005 and granted private creditors 39 days to accept it or to refuse it. The authors contend that the Decree is null and void from a constitutional point of view.

2.14 By submission of 31 January 2005, the authors sent a letter to the Chairperson of the Committee insisting that their case be "promptly examined". By letter of the same date addressed to the United Nations Secretary General, the authors complain about "serious irregularities" in the handling of their case by the Secretariat of the Committee.

The complaint

3.1 The authors claim that the State party had violated their right to be treated with equality and their right to property by not complying with its contractual obligations. They also claim that there is a denial of justice in their case because they have litigated for more than 30 years in domestic courts without getting any relief. They claim that the violations of the rights of the company constitute simultaneously a violation of their individual rights. The acts and omissions of the State party are said to amount to violations of articles 2, 14 and 26 of the Covenant.

3.2 The authors ask the Committee to intervene as a mediator between them and the government of Argentina. To this effect, they have submitted draft terms for a "transaction". This offer was opened to the Argentinean government until 13 April 2005.

3.3 The authors ask the Committee to grant interim measures of protection against Argentina, ordering the State party to halt the process of restructuring the internal indebtedness until the proposal "becomes legal". They also ask the Committee to provide them "police personnel for the prevention of crime", because justice has been denied to them for over 34 years.

Issues and proceedings before the Committee

4.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a), of the Optional Protocol.

4.3 The Committee notes that the authors have submitted the communication claiming to be victims of violations of their rights under articles 2, 14 and 26, because of the alleged failure of the State party to redress the damages caused to them as owners of the company Mariategui S.A.C.I.M.A.C, arising from the alleged violation of four contracts for the construction of public works in which the company acted either as the main creditor or as cessionary of the creditor. However, the Committee considers that the authors are essentially claiming rights that allegedly belong to a private company with an entirely separate legal personality, and not to them as individuals. It recalls its jurisprudence[1] that in regard to a claim such as that at issue in the present case, the authors have no standing under article 1 of the Optional Protocol. It concludes that communication is inadmissible *ratione personae* under that provision.

4.4 The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 1 of the Optional Protocol;

(b) That this decision shall be transmitted to the State party and to the authors.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report.]

Note

[1] See communication No. 1002/2001, *Franz Wallmann et al. v. Austria*, Views adopted 1 April 2004, para. 8.13; communication No. 737/1997, *Lamagna v. Australia*, decision of 7 April 1999, para. 6.2; and communication No. 502/1992, *S.M. v. Barbados*, decision of 31 March 1994, para. 6.2; communication No. 361/1989, *A publication and a private company v. Trinidad and Tobago*, decision of 14 July 1989, para. 3.2; communication No. 360/1989, *A newspaper publishing company v. Trinidad and Tobago*, decision of 14 July 1989, para. 3.2.

II. Communication No. 1379/2005, *Queenan v. Canada*
(Decision adopted on 26 July 2005, eighty-fourth session)*

Submitted by:	Peter Michael Queenan (not represented by counsel)
Alleged victim:	Canadian unborn children
State party:	Canada
Date of communication:	11 November 2004 (initial submission)
Subject matter:	Abortion
Procedural issues:	Action popularis
Substantive issues:	Recognition as a person before the law, discrimination on grounds of birth status, equality before the law, right to life, inhuman treatment
Articles of the Covenant:	16, 26, 6 and 7
Articles of the Optional Protocol:	1

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights, acting through its Working Group on Communications,

Meeting on 26 July 2005,

Adopts the following:

Decision on admissibility

1. The author of the communication dated 11 November 2004 is Peter Michael Queenan, a Canadian-South African citizen, born in 1957 in South Africa and resident of Canada. He submits his petition on behalf of Canadian unborn children and claims that they are victims of violations by Canada of articles 16, 26, 6 and 7 of the International Covenant on Civil and Political Rights (the Covenant). He is not represented by counsel.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

The text of an individual opinion signed by Committee member Ms. Ruth Wedgwood is appended to the present document.

Factual background

2.1 The author, as a Canadian citizen, is presenting his communication on behalf of Canadian unborn children, because they cannot present the complaint themselves. According to the author, the practice of abortion is openly facilitated and sponsored by the State party. He claims that this practice is the consequence of the fact that unborn children do not benefit from legal protection and are denied the right to life by the State.

2.2 The author submits a copy of part VIII, section 223 of the Canadian Criminal Code, which states that a child becomes a human being when born, and argues that an unborn human's life may be freely taken as long as it is done while the child is in the womb of its mother.

2.3 The author further submits statistics from 1987 to 2001, published by Statistics Canada on the official Canadian Government website, and points out that approximately 100,000 lives are currently taken every year by doctors in the State party.

2.4 The author argues that although abortion is a social and moral issue, it is also a human rights issue which affects both the mother and child, who should have the same fundamental rights. He further claims that popular acceptance or belief cannot supersede human rights, and that the fact that there is a modern consensus reflecting the view that abortion is an acceptable practice does not make it tolerable. He adds that polls in the State party indicate that most people want women to have the choice of abortion, but that the issue of human rights is not up to the outcome of polls and that the victims are not being included in the sample being polled.

The complaint

3.1 The author alleges a violation of article 16 of the Covenant in that the State party does not recognize unborn children as persons before the law, because section 223 (1) of the Criminal Code of Canada limits the definition of human beings to post-birth children.

3.2 The author claims that unborn children are victims of a violation of article 26 of the Covenant, as the State party does not treat unborn children as equal before the law, and does not provide them with legal protection. He points out that article 26 of the Covenant is by nature intended to prevent all forms of discrimination against any human, without distinction of any kind, including distinction such as "birth or other status", and that it covers all of humankind, as can be implied from the use of words like "all persons", "everyone", "all members of the human family", "human beings" and "all individuals". He opines that the only non-discriminatory definition of "human" or "person" includes all living members of the human species, and that a line cannot be drawn to identify when an embryo becomes human in terms of human rights.

3.3 The author further alleges that the State party has violated article 6 of the Covenant by legalizing, facilitating and funding the process by which an unborn human's life can be taken. He emphasizes that article 6 protects the right to life of "every human being", and that article 223 (2) of the Criminal Code, which does not recognize homicide performed on unborn humans, does not protect unborn humans' right to life. The author also refers to article 6, paragraph 5, which provides that the death penalty shall not be carried out on pregnant women.

He adds that the Convention on the Rights of the Child, ratified by the State party, which defines a child as "every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier", does not mention a lower limit, such as post-birth. The preamble of the same convention refers to the Declaration of the Rights of the Child, according to which "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth". The author contends that the Covenant would not contradict, disagree with or be more discriminatory with regard to children than the Convention on the Rights of the Child.

3.4 The author finally claims a violation of article 7 of the Covenant in that it allows abortion which he defines as a cruel, tortuous and inhuman practice. He emphasizes that the procedures of abortion are not regulated by the State.

3.5 With regard to exhaustion of domestic remedies, the author claims that these are ineffective, as numerous steps have been taken the last 30 years to have the rights of unborn recognized in Canada. He also considers that the State party has been given a chance to address this issue and has not shown any interest in it. The author argues that an appeal attempting to have the right to life and legal protection given to the unborn was brought to the Supreme Court and dismissed in March 1989. Petitions are regularly being submitted to the State, which has not taken any action to recognize the right to life of unborn humans. He finally points out that in recent years, two Private Member's Bills have been submitted to Parliament for recognition of the rights of the unborn, and have been refused.

3.6 The author states that the complaint has not been submitted to any other procedure of international investigation or settlement.

3.7 In an additional submission dated 22 April 2005, the author claims that his petition does not constitute an actio popularis, because the victims cannot submit the complaint themselves. The author believes that any citizen of a State party should have the right to appeal to the Committee regarding gross violations being performed by that State. He claims that limiting this right to those who are directly involved or related or associated, would leave the door open for States to perform injustices as long as the State could restrict access to or association with the victims. He thus feels justified, as a citizen of the State party, to represent the victims in his complaint.

Issues and proceedings before the Committee

Consideration of admissibility

4.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

4.2 The Committee notes that the author does not claim that he is a victim of the alleged violations of the Covenant by the State party. The author states that he is submitting this communication on behalf of all unborn children in the State party in general. The Committee notes that, in accordance with article 1 of the Optional Protocol, communications must be submitted by or on behalf of "individuals" who claim "that any of their rights enumerated under the Covenant" have been violated. The Committee considers that in the absence of specific claimants who can be individually identified, the author's communication amounts to an *actio popularis* and is therefore inadmissible under article 1 of the Optional Protocol.

5. Accordingly, the Committee decides:

(a) That the communication is inadmissible under article 1 of the Optional Protocol;

(b) That this decision shall be transmitted to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

APPENDIX

Individual opinion by Committee member Ms. Ruth Wedgwood

Under the complaint procedure of the First Optional Protocol of the International Covenant on Civil and Political Rights, the Human Rights Committee is empowered to receive communications from particular individuals who have suffered violations of the Covenant through state action. But, even in compelling circumstances, the Committee's procedural rules have not permitted the Committee to engage in a declaratory judgement, or to accept petitions on behalf of a general class of individuals.

Unlike some other human rights procedures, such petitions are considered to be *actio popularis* that fall outside the limited terms of the Optional Protocol. See Manfred Nowak, United Nations Covenant on Civil and Political Rights: CCPR Commentary (2nd revised edition 2005), at pp. 829-837.

The present petition, filed against Canada by author Peter Queenan on behalf of Canadian unborn children, alleges violations of the right to life under article 6 of the Covenant through state funding of abortions, and other violations. The Committee has concluded that it lacks jurisdiction to proceed upon such a complaint because it is brought as a general action on behalf of an entire class of individuals. This procedural rule does not prejudge any of the moral or legal issues that the author of the complaint would like to raise.

(Signed): Ms. Ruth Wedgwood

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

JJ. Communication No. 1389/2005, *Bertelli v. Spain* (Decision adopted on 25 July 2005, eighty-fourth session)*

Submitted by:	Luis Bertelli Gálvez (represented by counsel, José Luis Mazón Costa)
Alleged victim:	The author
State party:	Spain
Date of communication:	2 December 2004
Subject matter:	Extent of the review of criminal case against complainant on appeal by Spanish courts
Procedural issues:	Non-exhaustion of domestic remedies, failure to substantiate claims
Substantive issues:	Right to equal treatment before the courts and tribunals, right to have the sentence and conviction reviewed by a higher tribunal according to law and prohibition of unlawful attacks on the honour and reputation
Articles of the Covenant:	14, paragraphs 1 and 5, and 17
Articles of the Optional Protocol:	2 and 5, paragraphs 2 (a) and 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 July 2005,

Adopts the following:

Decision on admissibility

1. The author of the communication, dated 2 December 2004, is Luis Bertelli Gálvez, a lawyer of Spanish nationality born in 1949. He is represented by counsel Mr. Mazón Costa. He claims to be a victim of violations of articles 14, paragraph 1 and 5, and article 17 of the Covenant. The Optional Protocol entered into force for Spain on 25 April 1985.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Factual background

2.1 In 1984, the author was said to be a well respected lawyer in Malaga. He was known to have denounced abuses allegedly committed by local judges. On 18 May 1984, one Mr. Bohsali, accompanied by a police agent, visited the author's office. Mr. Bohsali had been investigated by Interpol in five countries and there were five criminal proceedings pending against him before Spanish courts. The author decided to assume the defence of Mr. Bohsali, who paid him part of his fees in advance. While the author was in the Canary Islands, where Mr. Bohsali had been indicted, the latter was arrested in Seville, but later released. According to the author, the police induced Mr. Bohsali to believe that the author had done nothing to help him but had deceived him. Accordingly, Mr. Bohsali filed for fraud against the author.

2.2 Proceedings against the author were conducted by a judge who was allegedly biased against him. The author was indicted by the First Chamber of the Provincial Court of Malaga (*Sección Primera de la Audiencia Provincial de Malaga*). The author filed criminal charges against the judges in the Supreme Court, alleging that they had committed an offence by handing down a manifestly unjust decision against him. The Supreme Court dismissed his allegations. In December 1985, the First Chamber of the Provincial Court of Malaga, allegedly composed of the same judges who had indicted him, sentenced him for fraud. The author states that the judgement characterized him in public as a swindler, a lawyer who had received payment in advance and had done nothing to defend his client.

2.3 On 13 December 1985, the author appealed to the Supreme Tribunal, alleging that the Provincial Court did not consider the evidence presented by him to demonstrate that he had duly performed his lawyer's duties. In November 1998, the Supreme Court dismissed the author's appeal, stating that it was not the task of the Court to weigh the evidence in the case. While this appeal was still pending before the Supreme Court, the Constitutional Court handed down a judgement in which it decided that a judge who indicted an accused could not participate in the judgement against the same accused. The Supreme Court allegedly totally ignored the Constitutional Court's decision in the author's case.

2.4 The author then appealed to the Constitutional Court, alleging that he was tried by biased judges who had sentenced him notwithstanding he had denounced them for handing down an unjust indictment against him. He also alleged that the appeal (cassation) did not fulfil the requirements of article 14, paragraph 5, of the Covenant, and that he was sentenced in violation of the principle of the presumption of innocence. On 19 June 1989, the Constitutional Court dismissed the appeal. The Court considered that the denunciation of the judges was not sufficient to recuse them because it was filed after the proceedings against the author had been instituted.[1] The Court also considered that the appeal (cassation) satisfied the requirements of the Covenant.

2.5 The author appealed to the European Commission of Human Rights, alleging that the judges who tried him were not impartial. On 29 May 1991, the Commission found that the application was inadmissible for non-exhaustion of domestic remedies.[2] The author considers that the Commission did not "examine" his application within the meaning of article 5, paragraph 2 (a), of the Optional Protocol. The alleged violation of article 14, paragraph 5 of the Covenant, or its equivalent under the European Convention on Human Rights, was never submitted to the Commission.

The complaint

3.1 The author claims a violation of article 14, paragraph 5, of the Covenant because he could not get a re-evaluation of the evidence in his case.

3.2 The author alleges a violation of article 14, paragraph 1, of the Covenant because he was sentenced by biased judges who had previously indicted him and who had been denounced by him. The judgement handed down by these judges was silent on all the evidence presented by the author to prove his innocence.

3.3 The author further alleges a violation of article 17 of the Covenant because the sentence of the Provincial Court of Malaga depicted him as a swindler, notwithstanding the evidence he presented. As a result of the judgement, his reputation was affected before public opinion.

Issues and proceedings before the Committee

Consideration of the Committee

4.1 Pursuant to rule 93 of its rules of procedure, before considering any claim contained in a complaint, the Human Rights Committee must determine whether it is admissible under the Optional Protocol to the Covenant on Civil and Political Rights.

4.2 The author first approached the Committee in 1998 and subsequently in 2004. He explains that, in the meantime, he had become the President of Fundación Jurei and that the Foundation had been involved in many activities for the promotion of human rights in Europe and South America, and that therefore not only his own reputation was at risk but also that of the Foundation. Subsequent delays in the registration of his communication were due to circumstances outside the control of the author. The Committee therefore concludes that the submission of the communication does not constitute an abuse of the right of submission of communications in the sense of article 3 of the Optional Protocol.

4.3 The Committee has noted that the author's complaint concerning article 14, paragraph 1, of the Covenant had already been submitted to the European Commission of Human Rights, which declared it inadmissible for non-exhaustion of domestic remedies on 29 May 1991. The Committee notes, however, that the European Commission did not examine the case within the meaning of article 5, paragraph 2 (a) of the Optional Protocol, since its decision was solely based on procedural grounds and it did not involve any consideration of the merits of the case. Therefore, no issue arises with regard to article 5, paragraph 2 (a) of the Optional Protocol as modified by the State party's reservation to this provision.

4.4 Concerning the requirement of exhaustion of domestic remedies, with respect to the alleged violation of article 17, which relates to the effects that the sentence of the Provincial Court of Malaga had on the author's reputation, the Committee notes that this issue was never raised before domestic courts. With regard to the alleged violation of article 14, paragraph 1, the Committee notes that this issue was not raised in the appeal (cassation) in the Supreme Court. This fact prompted both the Constitutional Court of Spain and the European Commission of Human Rights to decide that the allegation concerning the lack of impartiality was inadmissible for non-exhaustion of remedies. Therefore, the Committee finds that the author has not exhausted available domestic remedies for these two claims and declares this part of the communication inadmissible under article 5, paragraph 2 (b) of the Optional Protocol.

4.5 With regard to the alleged violation of article 14, paragraph 5, it transpires from the text of the judgement of the Supreme Court that, although the Court stated that "evaluation of [the evidence] is the responsibility of the trial court and not of this Court", it did deal extensively with the arguments put forward by the author and concluded that the author in fact had committed fraud because "there was deceitful behaviour and a selfish desire for profit, which misled another person and induced him to perform an act of disposition that was contrary to his own interests". The claim regarding article 14, paragraph 5, therefore, appears to be insufficiently substantiated for purposes of admissibility. Therefore, the Committee concludes that this claim is inadmissible under article 2 of the Optional Protocol.

4.6 The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under articles 2 and 5, paragraph 2 (*b*) of the Optional Protocol;

(b) That this decision shall be transmitted to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] According to the judgement of the Constitutional Court, the Court decided that the alleged violation of lack of impartiality of the judges was inadmissible due to the author's failure to raise the issue before the Supreme Court.

[2] The Commission considered that the allegation related to the lack of impartiality was not raised in the appeal (cassation) to the Supreme Court.

KK. Communication No. 1399/2005, *Cuartero Casado v. Spain* (Decision adopted on 25 July 2005, eighty-fourth session)*

Submitted by:	Luis Cuartero Casado (not represented by counsel)
Alleged victim:	The author
State party:	Spain
Date of communication:	18 November 2004 (initial submission)
Subject matter:	Evaluation of evidence and extent of the review of criminal case against complainant on appeal by Spanish courts
Procedural issues:	Failure to substantiate claims
Substantive issues:	Right to equal treatment before the courts and tribunals and right to have the sentence and conviction reviewed by a higher tribunal according to law
Articles of the Covenant:	14, paragraphs 1, 3 (d) and 5
Articles of the Optional Protocol:	2

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 July 2005,

Adopts the following:

Decision on admissibility

1. The author of the communication, dated 18 November 2004, is Luis Cuartero Casado, a Spanish citizen born in 1960, previously sentenced in 1993 for sexual aggression to 17 years imprisonment, and who was on prison leave at the time of the events. He claims to be a victim of a violation by Spain of article 14, paragraphs 1, 3 (d) and 5, of the Covenant. He is not represented by counsel. The Optional Protocol entered into force for Spain on 25 April 1985.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Factual background

2.1 On 24 October 1999, two complaints for sexual aggression were filed by two young women staying at Hotel Terra Brava in Lloret de Mar - Platja de Frenals (Girona):

(a) The first complaint was filed at 9.30 a.m. by a young Englishwoman, who had visited a pub in Platja Frenals the night before and was walking back to the hotel, when a man in a car stopped her, dragged her inside the vehicle and took her to a wood nearby, where he raped her. She then ran away and returned to the hotel. The following morning she denounced the attack and identified the author's photograph from a list made available by the police;

(b) The second complaint was filed at 12.30 p.m. by a young German woman, who had visited a pub in Lloret de Mar the night before and was walking back to the hotel when a man attacked her, placed a knife to her throat, took her to a deserted street, covered her face with a jacket and attempted to rape her. She grabbed the knife in her aggressor's pocket and stabbed him in the back, cutting his jacket. As she started to shout and kick, the aggressor ran away and his car keys fell on the floor, which she kept.

2.2 On 28 October 1999, the Court of First Instance No. 3 of Blanes (Girona), ordered a search of the author's house in Lloret de Mar, where a jogging suit similar to the one described by the victims was found. The author's car was also searched and a hairgrip, a woman's wallet and a blanket were found. All these items were recognized by the victims.

2.3 On 28 March 2001, the Provincial Court of Girona indicted the author for a crime of sexual aggression with intercourse and for attempted sexual aggression with intercourse, aggravated by the use of a knife, and sentenced him to 11 years and to 9 years and 6 months' imprisonment respectively.

2.4 The author appealed to the Supreme Court, alleging errors in the assessment of the evidence and violation of the right to be presumed innocent, based on the allegedly contradictory testimonies of the victims. On 22 February 2002, the Supreme Court dismissed the author's appeal and confirmed the sentence of the Provincial Court.

The complaint

3.1 The author claims to be a victim of a violation of article 14, paragraphs 1 and 3 (d), of the Covenant. Both claims are based on an allegedly erroneous assessment of the evidence by the Spanish Courts, which did not take into account alleged contradictions in the testimonies, and a violation of his right to be presumed innocent.

3.2 The author further claims to be a victim of article 14, paragraph 5, of the Covenant, because he could not get a proper re-evaluation of the evidence in his case.

Issues and proceedings before the Committee

Consideration of the Committee

4.1 Pursuant to rule 93 of its rules of procedure, before considering any claim contained in a complaint, the Human Rights Committee must determine whether it is admissible under the Optional Protocol to the Covenant on Civil and Political Rights.

4.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

4.3 With regard to the alleged violation of article 14, paragraphs 1 and 3 (d), the Committee recalls its constant jurisprudence that it is not competent to re-evaluate findings of fact or re-evaluate the application of domestic legislation, unless it can be ascertained that the decisions of domestic courts were arbitrary or amounted to a denial of justice.[1] The Committee considers that the author has failed to substantiate, for purposes of admissibility, that the conduct of the courts of the State party amounted to arbitrariness or a denial of justice and therefore declares both claims inadmissible under article 2 of the Optional Protocol.

4.4 With regard to the alleged violation of article 14, paragraph 5, it transpires from the text of the judgement of the Supreme Court that the Court did deal extensively with the assessment of the evidence by the Court of First Instance. In this regard, the Supreme Court considered that the elements of proof presented against the author were sufficient to outweigh the presumption of innocence, according to the test established by jurisprudence to ascertain the existence of sufficient evidence for the prosecution in certain types of crimes such as sexual aggressions. The claim regarding article 14, paragraph 5, therefore, is insufficiently substantiated for purposes of admissibility. The Committee concludes that this claim is inadmissible under article 2 of the Optional Protocol.

4.5 The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 2;

(b) That the decision be transmitted to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Note

[1] Cases Nos. 811/1998, *Mula v. Republic of Guyana*, 867/1999, *Smartt v. Republic of Guyana*, 917/2000, *Arutyunyan v. Uzbekistan*, 927/2000, *Svetik v. Belarus*, 1006/2001, *Martínez Muñoz v. Spain*, 1084/2002, *Bochaton v. France*, 1138/2002, *Arenz v. Germany* and 1167/2003, *Ramil Rayos v. The Philippines*.

Annex VII

FOLLOW-UP OF THE HUMAN RIGHTS COMMITTEE ON INDIVIDUAL COMMUNICATIONS UNDER THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

This report sets out all information provided by States parties and authors or their counsel since the last Annual Report (A/59/40).

State party	**ANGOLA**
Case	Carlos Diaz, 711/1996
Views adopted on	20 March 2000
Issues and violations found	No serious investigation of crimes committed by person in high position, harassment of the author and witnesses so that they cannot return to Angola, loss of property - article 9, paragraph 1.
Remedy recommended	An effective remedy and to take adequate measures to protect his personal security from threats of any kind.
Due date for State party response	17 July 2000
State party response	None
Further action taken/required	During the eighty-second session, on 1 November 2004, the Special Rapporteur met with a representative of the State party. The representative argued that the author had not exhausted domestic remedies and that the alleged incident had taken place before the Optional Protocol came into force. Thus, in his view, the Committee should have considered the case inadmissible. The Special Rapporteur explained the follow-up procedure, the issue of "continuing effects" under which the Committee had considered it within its competence to consider the case and the failure of the State party to respond to requests for information prior to and following the Committee's Views. The representative stated that he would relay the outcome of this meeting to his capital and request a written response to the Committee's Views. No information was received. A further meeting with the same representative of the State party took place during the eighty-fourth session. The representative reiterated his view that the author had not exhausted domestic remedies and that the Committee should not have declared the case admissible. Furthermore, it was not true that the Angolan authorities were unable to guarantee the author's security should he return to Angola and file a claim.

State party	**ANGOLA**
Case	Rafael Marques de Morais 1128/2002
Views adopted on	29 March 2005
Issues and violations found	The author's arrest and detention were neither reasonable nor necessary but, at least in part, of a punitive character and thus arbitrary; he was not informed of the reasons for his arrest; he was brought before a judge only 40 days after his arrest and remained incommunicado for 10 days. The severity of the sanctions imposed on the author cannot be considered as a proportionate measure to protect public order or the honour and the reputation of the President and, therefore, there had been a violation of article 19. The author's prevention from leaving the country and confiscation of his passport were in violation of article 12.
Remedy recommended	An effective remedy, including compensation.
Due date for State party response	1 July 2005
State party response	None
Further action	During the eighty-fourth session the Special Rapporteur met with a representative of the State party, who indicated that the State had limited capacity to deal with all human rights issues before it. That was the reason for not replying to the cases under consideration by the Committee. He stated that he would relay the outcome of this meeting to his capital and request a written response to the Committee's Views.
State party	**AUSTRALIA**
Case	C., 900/1999
Views adopted on	28 October 2002
Issues and violations found	Immigration detention of refugee applicant with psychiatric problems - articles 7 and 9, paragraphs 1 and 4.
Remedy recommended	As to the violations of articles 7 and 9 suffered by the author during the first period of detention, the State party should pay the author appropriate compensation. As to the proposed deportation of the author, the State party should refrain from deporting the author to Iran.
Due date for State party response	4 February 2003

Date of reply	28 September 2004 (similar reply received on 10 February 2003)
State party response	The State party advises the Committee that the author has been released from the Maribyrnong Immigration Detention Centre into home detention. He is now living in a private home in Melbourne. He is free to move about within the Australian community provided he is in the presence of one of his nominated relatives. This arrangement has been in place for over 14 months. The State party is considering how the author's situation is to be resolved but has not yet finalized this process. It ensures the Committee that a detailed response will be provided as soon as possible.
Author's response	On 19 October 2004, the author responded to the State party's submission, confirming that the author is in "home detention" but that his movements are restricted as described by the State party. He states that as the deportation order has not been revoked, he is still at risk of deportation, and that no compensation has been paid for his unlawful detention.
State party	**AUSTRALIA**
Case	Madafferi, 1011/2001
Views adopted on	28 July 2004
Issues and violations found	Deportation of Italian man to Italy, married to Australian with Australian-born children - article 10, paragraph 1.
Remedy recommended	In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective and appropriate remedy, including refraining from removing Mr. Madafferi from Australia before he has had the opportunity to have his spouse visa examined with due consideration given to the protection required by the children's status as minors.
Due date for State party response	26 October 2004
State party response	None
Author's response	On 17 March 2005, counsel submitted that the State party had still not resolved the author's situation. The author continues to be unwell, but while the State party has made arrangements for him to be released from the detention centre and to return home with liberal arrangements to stay within the community with a member of his family, his legal status has not changed. The Minister for Immigration is reluctant to make a decision.

State party	**AUSTRALIA**
Case	Young, 941/2000
Views adopted on	6 August 2003
Issues and violations found	Discrimination on grounds of sexual orientation in provision of social security benefits - article 26.
Remedy recommended	An effective remedy, including the reconsideration of his pension application without discrimination based on his sex or sexual orientation, if necessary through an amendment of the law.
Due date for State party response	12 November 2003
Date of reply	The State party had replied on 11 June 2004
State party response	In the State party's response, it submitted, inter alia, that it does not accept the Committee's finding that it violated article 26 and therefore rejects the conclusion that the author is entitled to an effective remedy. (see Annual Report CCPR/C/81/CRP.1/Add.6).
Author's response	On 16 August 2004, the author responded to the State party's submission, expressing his disappointment that the State party merely reiterates its arguments provided prior to consideration of the case. He is particularly offended by the State party's questioning of his long-standing and committed relationship of 38 years with his partner Mr. Cains. He requests the Committee to ask the State party to fulfil its obligations under the Covenant.

State party	**AUSTRALIA**
Case	Winata, 930/2000
Views adopted on	26 July 2001
Issues and violations found	Removal from Australia of Indonesian parents of Australia-born child - articles 17, 23, paragraph 1, and 24, paragraph 1.
Remedy recommended	To refrain from removing the authors from Australia before they have had an opportunity to have their applications for parent visas examined with due consideration given to the protection required by their child's status as a minor.
Due date for State party response	12 November 2001
Date of reply	2 September 2004

State party response	The State party advises that the authors remain in Australia and that it is considering how their situation can be resolved within existing Australian immigration laws. It ensures the Committee that a detailed response will be provided as soon as possible.
State party	**AUSTRALIA**
Case	Baban, 1014/2001
Views adopted on	6 August 2003
Issues and violations found	Deportation; risk of torture - articles 9, paragraphs 1 and 4.
Remedy recommended	Effective remedy, including compensation.
Due date for State party response	27 November 2003
Date of reply	18 February 2005
State party response	As to the finding that the State party breached its obligations regarding arbitrary detention under article 9, paragraph 1, the State party reiterates its submission to the Committee on the merits, that immigration detention is not arbitrary and is an exceptional measure reserved to persons who arrive or remain in Australia without authorization. The author and his son were free to leave Australia at any time while in detention. The High Court of Australia has upheld the constitutionality of Australia's immigration detention provisions under the Migration Act 1958, finding that they are not punitive but reasonably capable of being seen as necessary for the purposes of deportation or of enabling an entry application to be made and considered. Consistent with Australia's obligations under the Convention on the Rights of the Child, it was assessed to be in the best interests of the son for him to remain with his father, the author. In the individual circumstances of this case the detention was considered necessary, justifiable and appropriate. It was also proportionate to the ends sought, namely, to allow consideration of the author's claims and appeals, and to ensure the integrity of Australia's right to control entry. As to the finding of a violation of article 9, paragraph 4, the State party does not agree with the interpretation of this article. In its view the term "lawfulness" refers to the Australian domestic legal system, and there is nothing in the Covenant, *travaux preparatoires*, or Committee's general comments to suggest that it means "lawful at international law" or "not arbitrary". Thus, the State party does not accept the Committee's view that Australia breached article 9, paragraph 4 of the Covenant, neither is it of the view that the authors are entitled to an effective remedy.

State party	**AUSTRALIA**
Case	Bakhtiyari, 1069/2002
Views adopted on	29 October 2003
Issues and violations found	Possible deportation of the wife and children of the author while the latter is recognized as a refugee in Australia - articles 9, paragraphs 1 and 4, and 24, paragraph 1, and, potentially, of articles 17, paragraph 1, and 23, paragraph 1.
Remedy recommended	As to the violation of article 9, paragraphs 1 and 4, continuing up to the present time with respect to Mrs. Bakhtiyari, the State party should release her and pay her appropriate compensation. So far as concerns the violations of articles 9 and 24 suffered in the past by the children, which came to an end with their release on 25 August 2003, the State party is under an obligation to pay appropriate compensation to the children. The State party should also refrain from deporting Mrs. Bakhtiyari and her children while Mr. Bakhtiyari is pursuing domestic proceedings, as any such action on the part of the State party would result in violations of articles 17, paragraph 1, and 23, paragraph 1, of the Covenant.
Due date for State party response	1 February 2004
Date of reply	The State party had responded on 24 December 2004.
State party response	On 29 December 2004, the State party welcomes the finding that Mr. Bakhtiyari was not detained arbitrarily. As to the finding that the children and Mrs. Bakhtiyari were arbitrarily detained, the State party reiterates its submission to the Committee on the merits, that immigration detention is not arbitrary and is an exceptional measure reserved to persons who arrive or remain in Australia without authorization. It states that the process of assessing Mrs. Bakhtiyari's application for a protection visa and merits review of the decision on that application was completed within six months of the making of her application. Detention following that time reflects her own efforts to have a more favourable decision substituted by the Minister in her favour, and the hearing of domestic legal proceedings relating to her application. She was free to leave Australia with her children and husband at any time while in detention. The High Court of Australia has upheld the constitutionality of Australia's immigration detention provisions under the Migration Act 1958, finding that they are not punitive but reasonably capable of being seen as necessary for the purposes of deportation or of enabling an entry application to be made and considered. In these circumstances, the State party maintains that the detention of Mrs. Bakhtiyari is reasonable and proportionate, and remains justified. With regard to the view that the State party violated

	article 9, paragraph 4, with respect to Mrs. Bakhtiyari' and her children, the State party does not accept the Committee's interpretation. In its view the term "unlawful" in this provision refers to the Australian domestic legal system. There is nothing in the terms of the Covenant that suggests that "lawful" was intended to mean "lawful at international law" or "not arbitrary". It maintains that the option of seeking a writ of habeas corpus is and was available to Mrs. Bakhtiyari, and also to her children prior to their release. As to the possibility of a breach of articles 17 and 23 if Mrs. Bakhtiyari and her children are removed prior to Mr. Bakhtiyari, the State party submits that it is its objective to remove the family together. This can be demonstrated by the way in which the Government has managed the various family members to date. As to the Committee's view that the State party has breached the children's rights under article 24, it maintains its view that it has afforded the children adequate protection. Having regard to its position, the State party is not of the view that the authors are entitled to an effective remedy of compensation or that Mrs. Bakhtiyari is entitled to release.
State party	**AUSTRIA**
Case	Perterer, Paul, 1015/2001
Views adopted on	20 July 2004
Issues and violations found	Procedural improprieties in civil servant's disciplinary proceedings - article 14, paragraph 1.
Remedy recommended	An effective remedy, including payment of adequate compensation.
Due date for State party response	28 October 2004
Date of reply	29 October 2004
State party response	The State party submits that the office of the State Attorney and the Government of the Province of Salzburg are currently examining the author's claims for damage/just satisfaction, under the Austrian Official Liability Act. It also confirms that the Views have been published.
Author's response	On 5 January 2005, the author sent a newspaper article to the effect that he intended to file a claim for compensation but alleges that he is being denied information on his hypothetical salary. On 2 February 2005, the author stated that in a letter of 8 January 2004, he was informed that he had been refused compensation as "the officers of the Republic of Austria acted correctly and did nothing wrong".

Further action taken	Action taken: On 2 November 2004, the State party was requested to clarify the outcome of the author's claim for compensation.
Further information from author	By letter dated 23 June 2005 the author informed the Committee that, on 28 January 2005, the Office of state counsel (*Finanzprokuratur*) rejected his claims for compensation, in view of the fact that no State agency had acted against the law and intentionally. The author also addressed himself to the Federal Ombudsman's Office, which in early 2005 invited the Office of the Federal Chancellor to offer compensation to the author and indicated that, in its report to Parliament, it would include critical remarks about the author's case and the legislative framework governing disciplinary proceedings against civil servants. On 12 February 2005 the author proposed a "friendly settlement" to the federal and provincial governments, asking in particular for financial compensation. The provincial government did not respond and the Federal government referred him to the provincial government. In May 2005, the author applied for legal aid to initiate a State liability action (*Staatshaftungsklage*). On 20 June 2005 the Office of the provincial government informed the author that, in its opinion, his claims would have to be determined in judicial proceedings.
State party	**AUSTRIA**
Case	Weiss, 1086/2002
Views adopted on	3 April 2003
Issues and violations found	Extradition to the United States - article 14, paragraph 1 read together with article 2, paragraph 3.
Remedy recommended	To make such representations to the United States' authorities as may be required to ensure that the author does not suffer any consequential breaches of his rights under the Covenant, which would flow from the State party's extradition of the author in violation of its obligations under the Covenant and the Optional Protocol. To take appropriate steps to ensure that the Committee's requests for interim measures of protection will be respected.
Due date for State party response	8 August 2003
Date of reply	4 August 2004 (the State party had previously replied on 6 August 2003)

State party response	The State party provides a copy of the Supreme Court judgement of 9 September 2003. The Supreme Court accepts the author's application to file the petition out of time but then proceeds to dismiss it on the merits, concluding in the last sentence that, "The Supreme Court accordingly sees no reasons to doubt the constitutionality, of the application of the extradition treaty between the Austrian and United States governments." The State party also notes that according to the United States Department of Justice, litigation for a ruling that will give effect to the rule of speciality limitation with respect to the extradition from Austria to the United States is ongoing.
State party	**BELARUS**
Case	Svetik, 927/2000
Views adopted on	8 July 2004
Issues and violations found	The limitation of the liberty of expression did not legitimately serve one of the reasons enumerated in article 19, paragraph 3. Therefore, the author's rights under article 19, paragraph 2 of the Covenant had been violated.
Remedy recommended	Effective remedy, including compensation amounting to a sum not less than the present value of the fine and any legal costs paid by the author.
Due date for State party response	18 November 2004
Date of reply	12 July 2005
State party response	The competent authorities examined the decision by which the Krichevsk Court fined the author and came to the conclusion that it was adequate. The Supreme Court studied the Committee's Views, but did not find grounds for reopening the case. The author's responsibility was engaged not for the expression of his political opinions, but for his public call to boycott the local elections. Such call amounts to pressure on the conscience, will and behaviour of individuals to make them carry out particular acts or to refrain from carrying out certain acts. Accordingly, the State party concludes that it cannot agree with the Committee's findings that the author is a victim of violation of article 19, paragraph 2, of the Covenant.
State party	**CANADA**
Case	Judge, 829/1998
Views adopted on	5 August 2003

Issues and violations found	Deportation to face the death penalty - articles 6, paragraph 1, and 2, paragraph 3.
Remedy recommended	To make such representations as are possible to the receiving State to prevent the carrying out of the death penalty on the author.
Due date for State party response	13 November 2003
Date of reply	8 August 2004 - had previously replied on 17 November 2003.
State party response	Following the Special Rapporteur's request to the State party to provide an update from the United States authorities on the author's situation, the State party reiterated its response outlined in the Follow-up Report (CCPR/C/80/FU1) and the Annual Report (CCPR/C/81/CRP.1/Add.6). It added that a stay of execution was issued by the United States District Court for Eastern Pennsylvania in October 2002, and no date has been set for his execution.
State party	**CANADA**
Case	Mansour Ahani, 1051/2002
Issues and violations found	Removal to a country where the author risks torture and/or execution - articles 7, 9, paragraph 4, 13.
Remedy recommended	In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including compensation. In the light of the circumstances of the case, the State party, having failed to determine appropriately whether a substantial risk of torture existed such as to foreclose the author's deportation, is under an obligation (a) to make reparation to the author if it comes to light that torture was in fact suffered subsequent to deportation, and (b) to take such steps as may be appropriate to ensure that the author is not, in the future, subjected to torture as a result of the events of his presence in, and removal from, the State party. The State party is also under an obligation to avoid similar violations in the future, including by taking appropriate steps to ensure that the Committee's requests for interim measures of protection will be respected.
Due date for State party response	3 November 2004
Date of reply	3 September 2004
State party response	The State party contests the Committee's Views and submits that it has not violated its obligations under the Covenant. There has been no violation of its obligations in deporting the author while the case is under consideration by the Committee, as neither interim measures requests or indeed the Committee's Views are binding on the State party. As there

was no substantial risk of irreparable harm upon removal, and because the author posed a threat to the security of Canada, removal could not be delayed pending the Committee's decision. Despite the non-binding nature of interim measure requests the State party ensures the Committee that it always gives, as it did in this case, careful consideration to them, and will accept them wherever possible. This approach should not in any way be construed as a diminution of Canada's commitment to human rights or its ongoing collaboration with the Committee. Decisions on interim measure requests will be made on a case-by-case basis.

As to the finding of a violation of article 9, paragraph 4, as the period of nine and a half months after the final resolution of the constitutionality of the security certificate procedure was too long, the State party reiterates the points made in its submission prior to consideration, that the delay of nine and a half months was attributable to the author. It submits that the reasonableness hearing was prolonged between July 1997 and April 1998 to accommodate the author's counsel of choice. Neither the author nor his counsel expressed any concern with the delay and never requested the Court to expedite the hearing.

Equally, the State party contests the finding of a violation of article 13, submitting that the expulsion decision was confirmed to be in accordance with law by the Supreme Court and that the author did not argue otherwise. The author was permitted to submit reasons against his expulsion and these submissions were considered by the Minister prior to concluding that he constituted a danger to the security of Canada and that he faced only a minimal risk of harm upon deportation. The author was aware that the information used in the determination of the reasonableness of the security certificate process was to be the basis of the assessment of the danger he represented to the security of Canada. In the State party's view, article 13 does not require that he be given all the information available to the State and, considering it was a national security case, the process was fair. However, in order to simplify the process with respect to whether a person who is a danger to the security of Canada may be removed from Canada, the State party confirms that it now affords to all persons the same "enhanced procedural guarantees". In particular, all documents used to form the danger opinion are now provided to the person redacted for security concerns and they are entitled to make submissions.

The State party submits that its determination that the author did not face a substantial risk of torture upon removal has been confirmed by subsequent events, including a conversation between a Canadian representative and the author's mother, the latter of whom confirmed that the author was in good health, and a visit by the author to the Canadian embassy in Tehran on 1 October 2002, during which he did not complain of being ill-treated.

For the aforementioned reasons, the State party disagrees that it should make any reparation to the author or that it has any obligations to take further steps in this case. Nevertheless, in October 2002, Canada indicated to Iran that it expects it to comply with its international human rights obligations, including with respect to the author.

In its reply to the list of issues of the Committee against Torture, the State party submitted that it was in full compliance with its international obligations in this case and that it did not violate its obligations under article 13 Covenant. The Supreme Court of Canada concluded that the process accorded to the author was consistent with the principles of fundamental justice guaranteed by the Canadian Charter of Rights and Freedoms. The Court was satisfied that Ahani was fully informed of the Minister's case against him and given a full opportunity to respond. It also concluded that the procedures followed did not prejudice the author. The decision to remove was confirmed to be in accordance with law by the Supreme Court of Canada. Canada, on the basis of all of the evidence available to it, including Ahani's testimony and extensive submissions made by his counsel, concluded that the risk that the author would face upon return to Iran was only "minimal". Indeed, Canada's decision in this regard was upheld at all levels of judicial review and appeal. The Supreme Court of Canada held that the Minister's decision that the author did not face a substantial risk of torture on deportation was "unassailable."

The author was able to submit reasons against his removal. The decision to remove Ahani was the result of the balancing between the danger the author represented to the security of Canada and the risk he would face if returned to his country. This process culminated in the opinion issued by the Minister that Ahani constitutes a danger to the security of Canada and that he faced only a minimal risk of harm upon deportation. In order to simplify the process with respect to whether a person who is a danger to the security of Canada may be removed from Canada, the Canadian government now affords all such persons the same enhanced procedural guarantees. In particular, all documents used to form the danger opinion are now provided to the person redacted for security concerns and they are entitled to make submissions.

State party	**CROATIA**
Case	Paraga, 727/1996
Views adopted on	4 April 2001
Issues and violations found	"Continuing effects"; pretrial delay and freedom of expression - article 14, paragraph 3 (c).

Remedy recommended	Compensation
Due date for State party response	27 August 2001
Date of reply	The State party had responded on 29 October 2002.
State party response	On 2 December 2004, the State party informed the Committee that the author's application, of 14 January 2003, for damages sustained during the time spent in custody from 22 November to 18 December 1991 was rejected as untimely. The author has apparently lodged an appeal to this decision and the case is currently before the County Court of Zagreb.
Author's response	On 30 January 2005, the author confirmed that he had been refused compensation by the Municipal Court of Zagreb, and was in fact ordered to pay the State's legal costs. He has appealed this decision to the County Court of Zagreb, but nearly two years later the case has still not been heard.
Further action taken/required	Further action taken: The State party was requested to provide an update in due course.
State party	**CZECH REPUBLIC**
Case	Pezoldova, 757/1997
Views adopted on	25 October 2002
Issues and violations found	Property restitution - articles 2 and 26.
Remedy recommended	In accordance with article 2, paragraph 3 (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including an opportunity to file a new claim for restitution or compensation. The State party should review its legislation and administrative practices to ensure that all persons enjoy both equality before the law as well as the equal protection of the law.
Due date for State party response	5 March 2003
Author's response	On 6 March 2005, the author referred to the State party's failure to implement the Views of the Committee with respect to all of the Czech property cases on the grounds that it would (1) conflict with the rights of third parties (2) disturb the new property relation which are to a great extent the product of restitution legislation; and would be beyond the real capacity of the State budget. She argues that none of these

arguments are relevant to her case as no amendment to the law would be necessary and distinguishes her case from the other Czech property cases. By letter dated 21 June 2005, the author informed the Committee that in March 2005 he had requested a meeting with the Minister of Justice regarding the implementation of the Committee's recommendations. However, he has received no response yet.

State party response

On 26 July 2005 the State party informed the Committee that the Views had been published on the website of the Ministry of Justice in the spring of 2003. The State party contested the author's assertions that the national authorities had systematically denied her access to the documents that, according to her, proved that the real estate was confiscated under Decree No. 12/1945. Nevertheless, the State party respects the Committee's finding of a violation of article 26 in conjunction with article 2.

Legal experts from the ministries involved have agreed that it would be highly appropriate to propose to the Government that an adequate financial sum be offered to the author as an ex gratia payment for the violation of the Covenant. The Government, however, has to take the final decision and determine the amount to be paid.

The State party further states that the decisions of the national authorities declaring that the properties in question were not confiscated under Decree No. 12/1945 were correct. It admits that Act No. 143/1947, under which one family's property devolved *ex lege* to the State constitutes an unusual measure from the perspective of our time. However, such measure was taken much before the entry into force of the Covenant and the Optional Protocol, and therefore it is outside the Committee's competence.

State party

GUYANA

Cases

(1) Yasseem and Thomas, 676/1996; (2) Sahadeo, 728/1996; (3) Mulai, 811/1998; (4) Hendriks, 838/1998; and (5) Smartt, 867/1999.

Views adopted on

(1) 30 March 1998; (2) 1 November 2002; (3) 20 July 2004;
(4) 28 October 2002; (5) 6 July 2004

Issues and violations found

1. Death penalty case. Unfair trial, inhuman or degrading treatment resulting in forced confessions, conditions of detention - articles 10 paragraph 1, 14, paragraph 3 (b), (c), (e), in respect of both authors; 14, paragraph 3 (b), (d) in respect of Mr. Yasseen.

2. Prolonged pretrial detention - articles 9, paragraph 3, 14, paragraph 3 (c).

3. Death penalty after unfair trial - articles 6 and 14, paragraph 1.

	4. Death penalty following unfair trial and mistreatment - articles 9, paragraph 3 and 14, paragraph 3 (c), (d) and (e) and consequently of 6. **5. Death penalty after unfair trial - articles 6, and 14, paragraph 3 (d)**
Remedy recommended	1. Under article 2, paragraph 3 (a), of the Covenant, Messrs. Abdool S. Yasseen and Noel Thomas are entitled to an effective remedy. The Committee considers that in the circumstances of their case, this should entail their release. 2. The Committee is of the view that Mr. Sahadeo is entitled, under article 2, paragraph 3 (a), to an effective remedy, in view of the prolonged pretrial detention in violation of article 9, paragraph 3, and the delay in the subsequent trial, in violation of article 14, paragraph 3 (c), entailing a commutation of the sentence of death and compensation under article 9, paragraph 5, of the Covenant. 3. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Bharatraj and Lallman Mulai with an effective remedy, including commutation of their death sentences. 4. Effective remedy including commutation of sentence. 5. In accordance with article 2, paragraph 3, of the Covenant, the author's son is entitled to an effective remedy, including the commutation of his death sentence.
Due date for State party response	(1) 3 September 1998; (2) 21 March 2002; (3) 1 November 2004; (4) 10 March 2003; (5) 10 October 2004
State party response	No reply to any of these Views.
Further action taken/required	Action taken: During the eighty-third session (29 March 2005) the Rapporteur met with the Deputy Permanent Representative of Guyana to the United Nations. The Rapporteur explained his mandate and provided the representative with copies of the Views adopted by the Committee in the following communications: 676/1996 (Yasseem and Thomas), 728/1996 (Sahadeo), 838/1998 (Hendriks), 811/1998 (Mulai) and 867/1999 (Smartt). The Views were also sent to the Permanent Mission of Guyana by e-mail to facilitate their transmittal to the capital. The Rapporteur expressed concern about the lack of information received from the State party regarding the implementation of the Committee's recommendations on these cases. The representative gave the Rapporteur assurances that he would inform his authorities in the capital about the Rapporteur's concerns.

Author's response	With regard to communication No. 811/1998 (Mulai), the lawyer informed the Committee by letter dated 6 June 2005 that no measures had been taken by the State party to implement the Committee's recommendation.
State party	**IRELAND**
Case	Kavanagh, 819/1998
Views adopted on	4 April 2001
Issues and violations found	Trial before Special Criminal Court; non-reviewable decision by DPP - article 26.
Remedy recommended	In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy. The State party is also under an obligation to ensure that similar violations do not occur in the future: it should ensure that persons are not tried before the Special Criminal Court unless reasonable and objective criteria for the decision are provided.
Due date for State party response	2 August 2001
Date of reply	1 and 13 August 2001
State party response	See A/57/40, A/58/40, A/59/40 and A/60/40
Author's response	In a letter dated 15 March 2005, author's counsel requested that the follow-up procedure be reopened in this case. He reiterated his arguments previously provided, inter alia, that the only remedy offered was the sum of IR £1,000 (1,269.74 Euro) without any explanation, which the author had rejected as inadequate and returned to the Government immediately, and that in the interim the Government has taken no steps to ensure that no one is tried before the Special Criminal Court unless "reasonable and objective criteria" are provided for the decision to send them to that Court. He requested that the Special Rapporteur initiate a further meeting with the State party.
State party	**KOREA**
Case	Shin, 926/2000
Views adopted on	16 March 2004
Issues and violations found	Conviction for "subversive" art, destruction of painting - article 19, paragraph 2.

Remedy recommended	An effective remedy, including compensation for his conviction, annulment of his conviction, and legal costs. In addition, as the State party has not shown that any infringement on the author's freedom of expression, as expressed through the painting, is justified, it should return the painting to him in its original condition, bearing any necessary expenses incurred thereby.
Due date for State party response	21 June 2004
Date of reply	19 November 2004
State party response	The State party submits that the author was granted a special amnesty by the Government of the State party on 15 August 2000. Since he was convicted as guilty through legal proceedings, he is not eligible for compensation under the State Compensation Act. The author's painting is not returnable as it was lawfully confiscated through the Supreme Court's ruling. Even though he has been granted an amnesty, it has not changed the effect of the confiscation of his painting, according to article 5, paragraph 2, of the Amnesty Act "the effect of a punishment already made shall not be changed by amnesty, that is, the reduction of punishment or rehabilitation." Taking into account these legal limitations on the implementation of the Committee's Views, the Ministry of Justice is now considering the practices and procedures of other countries to give effect to the Views, with a view to introducing an effective implementation mechanism in the future. The Ministry of Justice sent the original text of the Views and its translated version in Korean to the Supreme Public Prosecutor's Office and requested that the law enforcement officials bear in mind these Views during their official activities. To prevent the recurrence of similar violations, the Government is now actively pursuing the abolition or revision of the National Security Law. In the meanwhile, the Government will continue to make the utmost efforts to minimize the possibility of arbitrary interpretation and application of the Law by law-enforcement officials. The Ministry has published the Views in Korean in the official Electronic Gazette.
State party	**KOREA**
Case	Keun-Tae Kim, 574/1999
Views adopted on	3 November 1998

Issues and violations found	Freedom of expression - article 19.
Remedy recommended	Under article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy.
Due date for State party response	30 March 1999
Date of reply	16 February 2005
State party response	The State party submits that since the author was found guilty of violating the National Security Act, he is not eligible for criminal compensation from the State under the terms of the Criminal Compensation Act unless he is acquitted of his criminal charges through a retrial. In addition, it states that since the investigation and trial were done in accordance with law, and there is no evidence demonstrating that public officials inflicted damage on the author intentionally or negligently, he may not claim damages under the State Compensation Act. The author has not applied for compensation under the Act on Restoration of Honor and Compensation for the People Involved in the Democratization Movement, which provides compensation for persons killed or injured in the course of forwarding the democratization movement. However, the State party submits that his honour was duly restored and he has been recognized as a person involved in the democratization movement. It states that he was granted amnesty on 15 August 1995 and thus is eligible for public elections. To prevent recurrence of similar violations, discussions are being held within the government and the National Assembly to amend or repeal some provisions of the National Security Act that require changes in order to reflect the recent reconciliation process in the inter-Korean relationship, and to prevent any possible violations of human rights. The investigation agencies and the judiciary have strictly limited the application of the National Security Act to situations which are absolutely necessary for maintaining the security of the State and protecting the survival and freedom of nationals. The Government published a translated version of the Views in Korean via the media, and also sent a copy to the Court.
Further action taken/required	Special Rapporteur's recommendation: The State party should be requested to provide an update on the amendments to or repeal of the National Security Act.

State party	**KOREA**
Case	Jong-Kyu Sohn, 518/1992
Views adopted on	19 July 1995
Issues and violations found	Conviction of trade union leader for union-related statements - freedom of expression - 19, paragraph 2.
Remedy recommended	An effective remedy, including appropriate compensation, for having been convicted for exercising his right to freedom of expression. The Committee further invites the State party to review article 13 (2) of the Labour Dispute Adjustment Act.
Due date for State party response	15 November 1995
Date of reply	16 February 2005
State party response	The State party submits that since the author was found guilty of violating the Labour Dispute Adjustment Act, he is not eligible for criminal compensation from the State under the terms of the Criminal Compensation Act unless he is acquitted of his criminal charges through a retrial. In addition, it states that the Supreme Court, found on 26 March 1999 that the State had no obligation to provide compensation to the author, under the State Compensation Act, with regard to the lawsuit which he had filed against the government based on the Committee's Views, as the Views are not legally binding and there is no evidence that public officials inflicted damage on the author intentionally or negligently in the course of the investigation or trial. The Act on Restoration of Honour and Compensation for the People Involved in the Democratization Movement, which provides compensation for persons killed or injured in the course of forwarding the democratization movement, is not applicable in the author's case as he was not injured. However, his honour was restored and he has been involved in the democratization movement. The State party submits that he was granted a special pardon on 6 March 1993. To prevent recurrence of similar violations, the Trade Union and Labour Relations Adjustment Act, enacted in March 1997, has repealed the provisions of the previous Labour Dispute Adjustment Act prohibiting third party intervention in labour disputes. Now under article 40 of the new Act, during collective bargaining or industrial action, a trade union may be supported by third parties such as a confederation of association organizations of which the trade union is a member or a person nominated by the trade union.

State party	**LATVIA**
Case	Ignatane, 884/1999
Views adopted on	25 July 2001
Issues and violations found	Arbitrary denial of candidature eligibility on basis of language - article 25.
Remedy recommended	"An effective remedy".
Due date for State party response	29 October 2001
Date of reply	July 2004 - had previously responded on 7 March 2002
State party response	In July 2004 and following a request by the Special Rapporteur in the Follow-up Report (CCPR/C/80/FU1) and referred to in the Annual Report (CCPR/C/81/CRP.1/Add.6), the State party provided a copy of its legislative amendments which, the State party had submitted in earlier correspondence, removed the problematic issues identified by the Committee it is Views.

State party	**LIBYAN ARAB JAMAHIRIYA**
Case	El Megreisi, 440/1992
Views adopted on	23 March 1994
Issues and violations found	The victim was kept in incommunicado detention, in a secret location, for years without ever being charged. The Committee concluded that his rights under articles 7, 9 and 10, paragraph 1 had been violated.
Remedy recommended	The Committee urged the State party to take effective measures to secure the victim's immediate release and provide him with compensation.
Due date for State party response	July 1994
State party response	None
Further action taken/required	During the eighty-fourth session, the Special Rapporteur met with a representative of the State party and discussed follow-up to the Committee's Views. The State party representative indicated that a previous request for pertinent follow-up information from the competent authorities had gone without reply, but he pledged to cooperate with the Committee on follow-up in the future.

State party	**LIBYAN ARAB JAMAHIRIYA**
Case	El Ghar, 1107/2002
Views adopted on	29 March 2004
Issues and violations found	Refusal by the State party to issue the author with a passport - article 12, paragraph 2.
Remedy recommended	The State party is under an obligation to ensure that the author has an effective remedy, including compensation. The Committee urges the State party to issue the author with a passport without further delay.
Due date for State party response	4 February 2005
State party response	None
Author's response	In a letter dated 23 June 2005 the author referred to the State party's failure to implement the Committee's Views. She had recently met with the Libyan consul in Casablanca, who informed her that he was not in a position to issue the passport, as the decision to that effect had to be taken by the central authorities.
Further action taken/required	During the eighty-fourth session, the Special Rapporteur met with a representative of the State party and discussed follow-up to the Committee's Views. The State party representative noted that the Libyan embassy in Morocco had once again been instructed to issue a passport to the author; he expressed confidence that a passport would be issued to Ms. El Ghar within weeks.
State party	**MADAGASCAR**
Cases	Marais, 49/1979; Wight, 115/1982; Joana 132/1982; Hammel 155/1983.
Views adopted on	29 October 1981; 1 April 1984; 1 April 1985; and 3 April 1987, respectively.
Issues and violations found	1. Poor prison conditions and no access to counsel - article 7, 10 paragraph 1, 14, paragraph 3 (b), (d). 2. Poor prison conditions and no access to counsel - article 7, 10, paragraph 1, 1, paragraph 3 (b).

	3. Arrest and detention on account of his political opinions; failure to inform of the reasons for his arrest; persecution on account of his political opinions - articles 9, paragraphs 1 and 2 and 19, paragraph 2. 4. Unable to take proceedings before a court to determine the lawfulness of his arrest; not allowed to submit the reasons for his expulsion - articles 9, paragraph 4, and 13.
Remedy recommended	1. An effective remedy for the violations which he has suffered and a decision by the State party to release Mr. Marais, prior to completion of his sentence, in response to his petition for clemency. 2. Take effective measures. 3. To take effective measures to remedy the violations which Monja Jaona has suffered, to grant him compensation under article 9, paragraph 5, of the Covenant, on account of his arbitrary arrest and detention. 4. Take effective measures.
Due date for State party response	29 February 1982; 1 August 1985; 1 August 1985; and 3 August 1987, respectively.
State party response	None
Further action taken/required	During the eighty-second session, on 28 October 2004, the Special Rapporteur met with a representative of the State party, who confirmed that she would relay the request for information in relation to these cases to her capital and request a written response to the Committee's Views. No response has been forthcoming.
State party	**NETHERLANDS**
Case	Derksen, 976/2001
Views adopted on	1 April 2004
Issues and violations found	Discrimination in provision for orphans - article 26.
Remedy recommended	The State party is under an obligation to provide half orphans' benefits in respect of Kaya Marcelle Bakker or an equivalent remedy.
Due date for State party response	24 August 2004

Date of reply 19 August 2004

State party response

While recognizing the importance of the individual complaints procedure and the seriousness of the Committee's decisions, the State party challenges the decision in this case. It fails to see how there can be unequal treatment in a situation in which none of the groups compared can derive entitlements from the legislation concerned. No half-orphans can claim entitlement in their own right to surviving dependents' benefit, not even those who are born from a relationship, marital or otherwise, which ended after 1 July 1996 with the death of one of the parents. According to the State party, one can only talk of a victim of direct or indirect discrimination, when someone is denied certain rights that are accorded to others in the same situation. In the case at issue, this would be the surviving parent, as it is the surviving parent to whom the benefit is awarded, and who may dispose of it entirely as he or she sees fit. Although the additional benefit is awarded to help pay for the maintenance of minor children, the State does not possess any instrument to guarantee or verify that it is used in this way. However, precisely in relation to the person entitled to benefit, the surviving parent, the Committee has determined that the failure to apply the new legislation to old cases does not amount to discrimination within the meaning of article 26. The State party is therefore unable to follow the reasoning that led the Committee to reach a different conclusion in relation to benefit for the maintenance of the half-orphan. The State party refers to the judgement of the European Court of Human Rights in the comparable case of *Van Bouwhuijsen and Schuring v. The Netherlands*, which dealt with half-orphans' benefit under the old legislation. The Court pointed out that benefit for the half-orphans had been refused not because the child had been born out of wedlock, but because the AWW did not provide for entitlement to benefit for half-orphans. The State party concludes from this that denying someone who is excluded by definition from entitlement to benefit under the terms of the legislation concerned cannot be classified as discrimination.

Author's response

On 3 December 2004, author's counsel expresses his disagreement with the State party's view. He states that the decision of the ECHR, cited by the State party does not support its view. The Court did not consider the substance of the complaint as the half orphan in question could not make an independent claim to the half-orphan's pension - it being granted to the surviving spouse. The Court found that the half orphan could not invoke article 1 of the Protocol number 1 of the Convention, as article 14 has no independent existence since it has effect only in relation to the "enjoyment of rights safeguarded by those provisions". Article 26 of the Covenant is wider and thus the preliminary condition which was at issue in the case before the ECHR was not at issue in this case.

Counsel submits that it is not at issue that the half-orphan's pension is provided on behalf of the half orphan and refers to a number of undisputed quotes from the history of the act.

It is logical, in counsel's view, that benefits for children in the form of children's allowance or a half-orphan's pension, are granted to the caregiving parent, as this (mostly) involves young children who do not have legal capacity. It is self-evident that such benefits are in the children's interest and that these children are entitled to the benefits. These benefits enable the child's caregiving parent, the dependent of the deceased parent of the child, to acquire extra financial resources to be spent on the child.

Counsel regrets the State party's disregard for the Committee's Views and requests the Committee to urge the State party to comply with the remedy included therein.

State party	**NORWAY**
Case	1155/2003, Leirvag
Views adopted on	3 November 2004
Issues and violations found	Failure to allow exemptions from teaching of "life stance" subject in schools is a violation of article 26 - Parental right to provide education to their children - article 18, paragraph 4.
Remedy recommended	In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective and appropriate remedy that will respect the right of the authors as parents to ensure and as pupils to receive an education that is in conformity with their own convictions. The State party is under an obligation to avoid similar violations in the future.
Due date for State party response	6 February 2005
Date of reply	4 February 2005
State party response	Amendments in the legal framework and curriculum The State party submits that the government will propose to Parliament that for the forthcoming school year, from August 2005, the following changes should enter into force: The deletion of the reference in section 2-4 of the Education Act to the object clause 1-2. Thus, section 2-4 would no longer prescribe that the object of the subject CREE is "to help to give students a moral and Christian upbringing". Furthermore, section 2-4 will be amended so that the different religions and philosophies of life are treated in a qualitatively equal manner. Changes to the national curriculum will be made accordingly. Amendments related to the exemption scheme

The following amendments will also be proposed to enter into force from August 2005:

- The right to exemption from any part of the school curriculum that could be conceived of as the practice of a particular belief will be set out in a separate section of the Education Act, in an effort to make it clear that the right to exemption from the practice of religious belief applies to all aspects of primary and lower secondary education.

- The Minister's circular on CREE will be amended to clearly identify those elements of the subject that could be conceived of as practice of a particular belief. The rules enabling parents to enrol their children in the exemption scheme will be simplified. The duty of schools to provide information to the parents about their right to exemption from any part of the teaching that they conceive of as the practice of religion will be stipulated in the Education Act.

- The amended circular on CREE will also instruct teachers to pay particular attention when using teaching methods that students could conceive of as the practice of a religion. If such methods are used, alternative instruction is to be offered.

Intermediate measures

Until these measures are implemented students will be granted a temporary right to exemption from the subject CREE, under which a written notice from parents will be sufficient for the students to be exempted. Schools will have a duty to attempt as far as possible to offer alternative teaching to these students.

Authors' comments

On 15 April 2005, the authors state that the State party's submission does not contain enough substance to determine how the mentioned changes in regulations and curricula will be carried out. They refer to a more detailed version of the remedies proposed in the "hearing document" of the Ministry of Education and Research of 8 February 2005, which has been sent to many organizations and institutions for comment by 29 March 2005. It states that a translated version of this document should be requested of the State party. The government's consideration of comments received has not yet been made public and a recommendation for Parliament concerning amendments of the Education Act has not yet been presented. Although the measures submitted by the State party have not been clarified, the author's preliminary view is that the proposed amendments do not fulfil the obligations under article 2 of the Covenant. They state, inter alia, that: the amendment to section 2-4 will not in itself solve the problem of an object clause which gives the prerogative to one particular religion;

there will be no "qualitatively equal" treatment as the CKREE subject is based on the storytelling tradition, which is only appropriate for teaching Christianity and other religions but not for life stances with for instance a humanist outlook; and that the government does not intend to change the character/general profile of the CKREE subject as practising belief. As to the exemption, the authors note that the State party accept that such a right is necessary in order to avoid further violations of the Covenant but that the proposed simplification procedure does not entail substantial changes to parents' rights since the school has the prerogative to determine whether or not the parent's conviction on this issue is "reasonable". In the authors' view the best way to have implemented the Committee's decision would have been to fully revise the CKREE subject in a way that considers the freedom of religion for all students - regardless of faith or personal conviction as to life stance.

State party	**THE PHILIPPINES**
Case	Cagas, 788/1997
Views adopted on	23 October 2001
Issues and violations found	Right to be tried without undue delay, right to presumption of innocence, and unreasonable delay in pretrial detention - articles 9, paragraph 3, 14, paragraph 2, 14, paragraph 3 (c).
Remedy recommended	In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, which shall entail adequate compensation for the time they have spent unlawfully in detention. The State party is also under an obligation to ensure that the authors be tried promptly with all the guarantees set forth in article 14 or, if this is not possible, released.
Due date for State party response	9 May 2002
Date of reply	19 August 2004
State party response	The State party submits that it did not provide information on the merits of this case, nor on counsel's supplementary comments, prior to consideration by the Committee as it believed the case to be inadmissible. As to the issues raised under articles 9, paragraph 3, and 14, paragraph 3, the State party submits that the delay in the trial was caused by the authors themselves when they questioned the trial court's denial of their petition for bail to the Supreme Court. According to the State party, this was a deliberate attempt by the authors to avoid, or at least delay,

	the trial of the case. As to the Committee's recommendation on compensation, the State party submits that any liability for unlawful detention would depend on the acquittal of the accused. In the event of an acquittal, the corresponding compensation for the time they have spent unlawfully in detention would have to be determined by the Board of Claims under the Department of Justice and/or by the Philippine Commission on Human Rights, the latter being the agency vested by the Constitution with the authority to provide for compensation to victims of violations of human rights. As to the recommendation of a fair trial, it informs the Committee that as of 22 March 2002, the Regional Trial Court in Pili, Camarines Sur "has concluded the trial of the above-mentioned case and that as from that date the same had already been submitted for decision." On 3 June 2005, and in response to counsel's submission, the State party informed the Special Rapporteur that on 18 January 2005, the Regional Trial Court of Pili, Camarines Sur, pronounced its judgement. The accused Cagas, Butin, and Astilero were all found guilty by the trial court of multiple murder, qualified by treachery, for the killing of Dr. Dolores Arevalo, Encarnacion Basco, Arriane Arevalo, Dr. Analyn Claro, Marilyn Oporto and Elin Paloma. Cagas and Antillero were sentenced to reclusion perpetua for each of the murders. Butin died before the rendering of the final judgement.
Author's response	On 24 October 2004, authors' counsel commented that the denial of bail was pursued to the Supreme Court as it was considered unlawful and unfair, and was not for the purposes of delaying the trial. The delay was brought about by the judiciary's failure to schedule the case for trial, even after the issue of bail had been considered. Counsel denies that this case has been heard. He states that the date of submission of the last pleading to the court was on 2 August 2000, and that according to the court's rules the case should have been heard within 90 days of that date. On 18 July 2003, counsel filed an urgent ex parte plea for a resolution without success. Finally, counsel states that the State party omitted to inform the Committee that one of the authors, Mr. Wilson Butin, died of natural causes while in preventive detention and while waiting for a judgement in this case.
Further action taken/required	The Special Rapporteur met with a representative of the State party during the eighty-fourth session. See below.
State party	**PHILIPPINES**
Case	Wilson, 868/1999
Views adopted on	30 October 2003

Issues and violations found	Mandatory death penalty for rape after unfair trial - "most serious" crime. Compensation after acquittal - articles 7, 9, paragraphs 1, 2, and 3, 10, paragraphs 1, and 2.
Remedy recommended	In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy. In respect of the violations of article 9 the State party should compensate the author. As to the violations of articles 7 and 10 suffered while in detention, including subsequent to sentence of death, the Committee observes that the compensation provided by the State party under its domestic law was not directed at these violations, and that compensation due to the author should take due account both of the seriousness of the violations and the damage to the author caused. In this context, the Committee recalls the duty upon the State party to undertake a comprehensive and impartial investigation of the issues raised in the course of the author's detention, and to draw the appropriate penal and disciplinary consequences for the individuals found responsible. As to the imposition of immigration fees and visa exclusion, the Committee takes the view that in order to remedy the violations of the Covenant the State party should refund to the author the moneys claimed from him. All monetary compensation thus due to the author by the State party should be made available for payment to the author at the venue of his choice, be it within the State party's territory or abroad.
Due date for State party response	10 February 2004
Date of reply	12 May 2005
State party response	The State party is "disinclined" to accept the Committee's findings of facts, more particularly its assessment of evidence. It submits that the findings rests on faulty appreciation of facts and it is doubtful if the facts disclosed by the complainant would by themselves support the findings. It contests the finding that the compensation provided was inadequate. It submits that the author failed to discharge the burden of proof; ex parte statements made by the complainant are not considered evidence and do not constitute sufficient proof of the facts alleged. An investigation conducted by the City jail Warden of the Valenzuela City Jail, where the author was confined, disputed all allegations made by the author. The author had failed to provide specific acts of harassment to which he was supposedly subjected to while in prison and did not identify the prison guards who allegedly extorted money from him. As the author had already flown home while the communication was pending before the Committee he could not have

feared for his security by naming those who had allegedly ill-treated him. It reiterates its submission that the author failed to exhaust domestic remedies. Finally, it considers that the compensation provided is adequate that the author has not yet sent an authorized representative to claim the checks on his behalf and that by insisting that the State party make available to the complainant all monetary compensation due to him, "the Committee might have exceeded its competency and caused great injustice to the State party."

Further action taken/required	The Special Rapporteur met with a representative of the State party during the eighty-fourth session. See below.
State party	**PHILIPPINES**
Case	Carpo, 1077/200
Views adopted on	28 March 2003
Issues and violations found	Death sentence - article 6, paragraph 1.
Remedy recommended	In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective and appropriate remedy, including commutation. The State party is under an obligation to avoid similar violations in the future.
Due date for State party response	12 August 2003
Date of reply	5 October 2004
State party response	The State party submitted that as to the finding of a violation of article 6, paragraph 2, the Committee's finding that the offence of murder entails a very broad definition, "requiring simply the killing of another individual", is incorrect and there exists in the State party's Penal Code a clear distinction between different types of unlawful killings. Thus, the State party cannot be held liable for arbitrary deprivation of life on the basis of such an unfounded conclusion. It also submits that it cannot be concluded that the imposition of the death penalty was made by automatic imposition of article 48 of the Revised Penal Code. Such a conclusion rests on the false assumption that article 48 provides for the mandatory imposition of the death sentence in cases where a single act results in several unlawful killings. It is argued that there is no indication in the phraseology of this provision which indicates that the term "maximum period" alludes to the

penalty of death. Article 48 merely prescribes that if one single act results in two or more offences, the penalty for the most serious crime will be imposed i.e. a penalty lower that the aggregate of the penalties for each offence, if imposed separately.

Similarly, the State party submits that there is nothing in this provision which authorizes local courts to disregard the personal circumstances of the offender as well as the circumstances of the offence in considering cases which involve complex crimes. In its view, no persuasive basis was laid down to justify the conclusion that the imposition of the death penalty upon the authors was made "without regard being able to be paid to the authors' personal circumstances or the circumstances of the particular offence."

Finally, as to the conclusion that the authors did not receive a real review in the Supreme Court, which practically foreclosed the presentation of any new evidence, the State party submits that this Court is not a "trier" of facts and is not obliged to repeat the proceedings before the trial courts. A review by the Supreme Court is meant to ensure that the conclusions of the trial court are consistent with prevailing laws and procedures. In addition, it adds that there is nothing on record to show that the authors were going to present new evidence not previously considered by the trial court.

Further action taken/required

On 21 July 2005, the Special Rapporteur held follow-up consultations with a representative of the State party. He noted that two follow-up replies remained outstanding and that other replies might be construed as not being satisfactory, constituting in reality belated merits submissions rather than follow-up submissions. The State party representatives pledged to secure follow-up information in the outstanding cases (1167/2003, Ramil Rayos, and 1110/2002, Rolando) and to seek confirmation as to whether there would be additional follow-up submissions in the other cases, notably in the cases of Wilson (868/1999) and Piandiong (869/1999).

State party **RUSSIAN FEDERATION**

Case Smirnova, 712/1996

Views adopted on 5 July 2004

Issues and violations found

Pretrial detention; failure to be informed of the grounds of arrest or of any of the charges against her; failure to be brought promptly before a judge or judicial officer; denial of the right to take proceedings before the court on the lawfulness of her arrest; conditions of detention and lack of medical treatment - articles 9, paragraphs 3, and 4 and 10, paragraph 1.

Remedy recommended	An effective remedy, including appropriate compensation for the violations suffered.
Due date for State party response	28 October 2004
Date of reply	24 November 2004
State party response	The State party sets out a brief factual background. It then submits that the author's complaint about the unlawfulness of her detention was reviewed by the court in accordance with the legislation which then prevailed. Section 331 did not allow for a challenge to a decision taken by a court under section 220-2. A decision of the Constitutional Court in 1998 found section 331 to be unconstitutional in so far as it did not allow for an appeal against judicial decisions relating to pretrial detention. Since this decision, appeals against decisions of a court under section 220-2 are possible and have occurred. The Supreme Court ruling was reflected in the new Criminal Procedure Code. The right to appeal a decision on pretrial detention is fully used by those involved in the criminal justice system. In the first half of 2004, Russian courts examined 116,760 motions/appeals in relation to decisions to detain people in pretrial detention. 105, 364 of these have been upheld, i.e. 90.2 per cent. The Plenary of the Supreme Court is currently reviewing questions regarding the process of extending the term of pretrial detention for the purposes of establishing a uniform recommendation on this practice. The Committee's conclusions that the State party violated article 10, paragraph 1, are, in the State party's view, not substantiated/justified. On 10 December 1996 the author was placed in a special "open" detention centre for women, No 6 in Moscow, the conditions of which are recognized as satisfactory. During her detention, the author required medical assistance. The facts regarding the worsening of her chronic condition (vasculitis) were not known at that stage. According to doctors who treated her at the time, there was no medical basis for her not to be placed in pretrial detention. The author made numerous appeals and protests, but never complained about the conditions of detention.
State party	**RUSSIAN FEDERATION**
Case	Lantsova, 763/1997
Views adopted on	26 March 2002

Issues and violations found	Death in custody; poor conditions of detention - articles 6 and 10.
Remedy recommended	The Committee is of the view that Mrs. Lantsova is entitled, under article 2, paragraph 3 (a) of the Covenant, to an effective remedy. The State party should take effective measures: (a) to grant appropriate compensation (b) to order an official inquiry into the death of Mr. Lantsov; and (c) to ensure that similar violations do not recur in the future, especially by taking immediate steps to ensure that conditions of detention are compatible with the State party's obligation under articles 6 and 10 of the Covenant.
Due date for State party response	22 September 2002
Date of reply	23 September 2004
State party response	The State party reiterated its previous arguments of 16 October 2002 (see A/58/40, p. 123, para. 247) - that an internal investigation of the cause of the author's death was already held in 1995, as well as an inquiry of the independent Commission of medical experts. Their conclusions did not reveal any illegal action of the detention centre's personnel.
State party	**RUSSIAN FEDERATION**
Case	Gridin, 770//1997
Views adopted on	20 July 2000
Issues and violations found	Unlawful arrest and detention (warrant issued three days after the beginning of the detention) and denial of access to a lawyer, unfair trial, violation of the presumption of innocence - articles 9, paragraph 1 and 14, paragraphs 1, 2 and 3 (c).
Remedy recommended	Compensation and author's immediate release.
Due date for State party response	14 December 2000
Date of reply	23 September 2004 (the State party had previously responded on 18 October 2001 [see Annual Report A/57/40 (Vol. I])
State party response	In its second response to the Committee's Views, the State party noted that these Views were reviewed in the Supreme Court, but that the arguments in the Committee's decision were found to be unsubstantiated ("without confirmation"), even upon a second review of the materials of the case.

In accordance with law, the author was arrested on 26 November 1989. His arrest was sanctioned by the procurator on 29 November 1989. He was allowed access to a lawyer from the moment he was charged, as per legal requirements. He never complained about not having access to a lawyer, and a lawyer did in fact take part in all aspects of the case. His right to a legal defence was therefore not violated.

In view of the fact that he was accused of rape, the author was tried in private session. No violations of the criminal procedure code were identified in relation to the examination of the forensic and other evidence. Gridin and his lawyer were given proper access to relevant materials in order to prepare the defence.

Finally, the State party argues that it is well established that the Committee is not a court and that its views are recommendatory. Such views are highly authoritative for the State party's authorities, and they are taken very seriously; thus the State party conducted a second review of this case. However, the State party's conclusions in this matter remain the same.

Author	In a letter received on 20 June 2005 the lawyer complains about the fact that the Committee's recommendation has not been implemented.
State party	**RUSSIAN FEDERATION**
Case	Dugin, 815/1998
Views adopted on	5 July 2004
Issues and violations found	Improper pretrial investigation and unfair trial - article 14.
Remedy recommended	Pursuant to article 2, paragraph 3 (a) of the Covenant, the Committee considers that the author is entitled to an appropriate remedy, including compensation and his immediate release.
Due date for State party response	3 October 2004
Date of reply	10 December 2004
State party response	The State party reiterated the information provided in its submissions to the Committee prior to consideration. The author's trial occurred in 1995 in accordance with the previous Criminal Code of the Russian Soviet, Federative, Socialist Republic (i.e. old USSR era Code) of 1960. The witness whom the author wanted to call, Chikin, was one of the victims; he was also a witness to the murder of Naumkin. The law allowed the Court to proceed with the trial even in the event that such a

witness did not appear to give evidence. In accordance with law, the Court in this case considered whether to continue with the case, or adjourn the case until Chikin could be brought to court to testify; it decided to continue with the trial because it considered that even in the absence of Chikin it would be possible to arrive at a full understanding of what had occurred. The law allowed for the written statement given by Chikin when examined by the investigator to be read out into court, in circumstances where it is not possible to have the witness appear in court; and this is what occurred. (The police couldn't find Chikin to get him to testify).

On 1 July 2002, a new Criminal Code came into force in the State party. It contains similar provisions to those mentioned above.

In relation to the issue of the expert evidence, the author was able to ask for explanations and further information regarding the conclusions of the expert after these had been read out in Court. However, calling the expert to appear in court was not compulsory under the old Code, nor is it compulsory under the new code.

Author's response	On 20 March 2005, author's counsel commented on the State party's submission. He submitted that it did not contain any convincing arguments addressing his client's position; it does not address the issue of the State party's obligation to take all measures to provide for the examination of witnesses. Further, no information was provided about the why the medical expert was not examined in court.
State party	**RUSSIAN FEDERATION**
Case	Telitsin, 888/1999
Views adopted on	29 March 2004
Issues and violations found	No effective investigation following torture and inhuman treatment in detention resulting in death - articles 6, paragraph 1, 7 and 10, paragraph 1.
Remedy recommended	An effective remedy. The Committee invited the State party to take effective measures (a) to conduct an appropriate, thorough and transparent inquiry into the circumstances of the death of Mr. Vladimir Nikolayevich Telitsin; and (b) to grant the author appropriate compensation.
Due date for State party response	20 July 2004
Date of reply	24 November 2004 and 17 January 2005

State party response

The State party informs the Committee that, on 6 September 2004, at the direction of the General Procurator, the Procurator of the Sverdlovsk region changed the decision not to initiate criminal proceedings in relation to the author's death, on the basis that the investigation into the circumstances of the matter had been incomplete.

An additional examination was ordered, which was conducted by the Nizhnetagilski procurator. The medical expert Isakova, who had examined Telitsin's body, was re-questioned. She said that aside from a strangulation mark, no other injuries were identified on the body. She considered that death had resulted from asphyxiation caused by a noose. A nurse, Kudrinova, who attended the autopsy, confirmed these views.

In order to test the contentions of the author that death was occasioned with the participation of certain prison guards, archival material from 1994 was examined. According to available data, the guards in question have now retired and no longer work at the prison. In view of the time frames for retention of documents regarding prison personnel, all measures are being taken to identify the documents in question.

An expert review of the post mortem photographs has been ordered. For technical reasons this cannot take place in the prison, so it is being conducted elsewhere in the region.

Because the author refused to appear at the procurator's office to explain her arguments for the exhumation of the body and other matters, the Nizhnetagilski procurator decided on 24 September 2004 to refuse to open a criminal case. However, this decision was revoked on 30 September 2004 by the same body, and in the near future it is intended to exhume the body of Telitsin, to examine the post mortem photographs and question the former prison guards.

The investigation is continuing under the supervision of the General Procurator.

On 17 January 2005, the State party submitted that in order to check the allegations made by Telitsina about the mistreatment of her son (death in custody), the Nizhnetagilski Procurator undertook a further investigation, during which the body of Telitsina's son was exhumed; other tests and verifications (unspecified) were also conducted. There was no evidence of any crimes having been inflicted on Telitsin, and accordingly on 8 October 2004 a decision was taken (presumably by the same procurator's office) not to instigate any criminal investigation. The General Procurator of the Russian Federation also examined the materials above, and agreed with this conclusion.

On 9 March 2005, the State party provided a copy of a decision of 8 October 2004, by which the Senior Assistant of the Prosecutor of Nizhyi Tagil had rejected Mrs. Telitsina's request to open a criminal case in relation to her son's death. The prosecutor had examined the author's allegations and confronted them with existing evidence, including witnesses' depositions, and the results of the examination, on 6 October 2004, of the exhumed body of the alleged victim. The prosecutor decided not to open a criminal case for absence of corpus delicti.

State party

SPAIN - GENERAL INFORMATION ON CASES RELATING TO ARTICLE 14, PARAGRAPH 5 VIOLATIONS

On 16 November 2004, the State party informs the Committee that Law 19/2003, of 23 December 2003, came into force on 16 January 2004. This law introduces the remedy of appeal against the judgements of the National Court (Audiencia Nacional) and those of the Provincial Courts (Audiencias Provinciales). It is intended to reduce the backlog of cases of the Supreme Court and to comply with the Committes's Views in Gómez Vásquez's case. Although the law was passed and has come into effect, the State party insists that: (i) the previous system of appeal (cassation) was very similar to other European systems and even broader than some of its European counterparts, as it allowed for a review when there was a factual mistake in the weighing of evidence, bypassing the scope of traditional remedy of cassation, which was limited to points of law; (ii) the European Court of Human Rights had found that the Spanish cassation complied entirely with the right to have the sentence reviewed by a higher tribunal; and (iii) that cassation was broad enough to encompass situations in which the presumption of innocence is involved.

According to the State party, no provision of the Covenant could oblige the State party to modify sentences already executed because this would violate the principle of res judicata. This conclusion is applicable to all communications already examined by the Committee as well as new communications, related to sentences and convictions passed before the entry into force of Law 19/2003, which raise the issue of the compatibility of Spanish cassation with article 14, paragraph 5, of the Covenant. Law 19/2003 is procedural in nature and does not have any retroactive effect.

Author

In March 2005 the lawyer in some of the cases where the Committee found violations of article 14, paragraph 5, informed the Committee that the State party had not taken legislative measures aiming at the implementation of the Committee's recommendations. There is no procedure in Spain, in general, to implement the decisions/judgements on individual complaints of the international human rights bodies, a situation that has been denounced by the Ombudsman, bar associations and NGOs. A bill introduced in October 2002 to that effect was rejected by the Parliament.

State party	**SPAIN**
Case	526/1993, Hill et al.
Views adopted on	2 April 1997
Issues and violations found	Prolonged pretrial detention and impossibility of the accused to defend themselves in person before the Spanish Courts - articles 9, paragraph 3, 10, 14, paragraph 3 (c), and 5 for both authors, plus 14, paragraph 3 (d) in respect of M. Hill only.
Remedy recommended	Pursuant to article 2, paragraph 3 (a), of the Covenant, the authors are entitled to an effective remedy, entailing compensation.
Due date for State party response	On 9 October 1997, the State party had provided information on the possibility of seeking compensation.
Date of reply	16 November 2004
State party response	The State party submits that the author filed an application to have his conviction and sentence quashed. The Constitutional Court dismissed the application, but indicated that the author should file an appeal (revision). The author filed an appeal (revision) with the Second Chamber of the Supreme Court, which on 25 July 2002 decided to set aside the decision of the appellate court (Supreme Court) and again rejected the author's original appeal (cassation). This second judgement of the Supreme Court, unlike the previous judgement duly analysed the evidence, prior to rejecting the appeal (cassation). The author filed an appeal (*amparo*) with the Constitutional Court which is still pending. He also filed a suit in law against the Ministry of Justice for wrongful administration of justice. This claim was dismissed and an appeal with the National Court is still pending.

State party	**SPAIN**
Case	701/1996, Gómez Vásquez
Views adopted on	20 July 2000
Issues and violations found	Denial of an effective appeal against conviction and sentence for the most serious crimes (incomplete judicial review) - article 14, paragraph 5.
Remedy recommended	Effective remedy, author's conviction must be set aside unless it is subjected to review in accordance with article 14, paragraph 5.
Due date for State party response	14 November 2000 - The State party has previously responded on.

State party response	On 16 November 2004, the State party submits that on 14 December 2001, the Plenary of the Supreme Court decided to dismiss the application to have the author's conviction quashed. This is a landmark decision of the Supreme Court on the compatibility of the Spanish cassation with the requirements of article 14, paragraph 5, of the Covenant.
State party	**SPAIN**
Case	1007/2001, Sineiro
Views adopted on	7 August 2003
Issues and violations found	Denial of an effective appeal against conviction and sentence for the most serious crimes (incomplete judicial review) - article 14, paragraph 5.
Remedy recommended	Effective remedy, author's conviction must be set aside unless it is subjected to review in accordance with article 14, paragraph 5.
Due date for State party response	20 November 2003
Date of reply	16 November 2004
State party response	The State party submits that on 16 February 2004, the Second Chamber of the Supreme Court dismissed an application for the annulment of the sentence and conviction.
State party	**SPAIN**
Case	986/2001, Semey
Views adopted on	30 July 2003
Issues and violations found	Denial of an effective appeal against conviction and sentence for the most serious crimes (incomplete judicial review) - article 14, paragraph 5.
Remedy recommended	The author should be entitled to have his conviction reviewed in conformity with the requirements of article 14, paragraph 5, of the Covenant.
Due date for State party response	20 November 2003 - State party had responded on 5 March 2004 (see A/59/40)
Date of reply	16 November 2004

State party response	The State party submits that other than having sent letters to the Committee, the President of the Republic and the Ministry of Justice, there is no indication that the author has filed any appeal before the domestic courts.
State party	**SRI LANKA**
Case	Kankanamge, Victor Ivan, 909/2000
Views adopted on	29 July 2004
Issues and violations found	Intimidation of journalist by repeated presentation of defamation indictments - articles 2, paragraph 3, 14, paragraph 3 (c), and 19.
Remedy recommended	In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy including appropriate compensation. The State party is also under an obligation to prevent similar violations in the future.
Due date for State party response	24 November 2004
Date of reply	2 February 2005
State party response	The State party submits that the government of Sri Lanka will refer the case to the Human Rights Commission of Sri Lanka to make recommendations on the question of payment of compensation, including the determination of the quantum of such compensation.
State party	**SRI LANKA**
Case	Jayawardena, 916/2000
Views adopted on	22 July 2002
Issues and violations found	Death Threats against Member of Parliament - article 9, paragraph 1.
Remedy recommended	"an appropriate remedy"
Due date for State party response	22 October 2002
Date of reply	9 September 2004
State party response	(Reproduced in previous Interim Follow-up Report) Pursuant to the Committee's views, the State party made further inquiries in the course of which the author had made another statement. Since he had been unable to identify the persons who had allegedly threatened him, no

further legal action was taken. Nevertheless, the Government had agreed to provide additional protection for him if and when it became necessary. No such requests for additional protection have been made by him. In view of the above, the State party considers the matter closed.

Following the author's response of 18 October 2004, the State party submitted further comments on 24 March 2005. It stated that the deployment of security personnel for VIPs by the Police is effected on the basis of circular instructions issued by the Inspector General of Police. Accordingly, a Member of Parliament is entitled only to two security personnel. The threat perception report received from the Intelligence Services has not categorized Dr. Jayawardena as a Member of Parliament, having a threat for any source. However, in consideration of his request, two additional security personnel have been provided to him, increasing the total strength of his security staff to four.

Author's response	(New information from author) On 18 October 2004, the author responded to the State party's submission. He states that the State party has taken no steps to investigate his complaints of death threats. He requested additional security from the State party but has not yet received a positive response, in fact his security has been reduced. The President has not taken any steps to withdraw or to rectify the allegations which she made against him. He submits that he was elected again as a Member of Parliament at the elections held in April 2004, is currently the shadow Minister of Rehabilitation, Resettlement and Refugees, and through his work has made representations regarding the violations of human rights of opposition Members of Parliament. For this reason, he alleges that his life has become more vulnerable. He requests the Committee to inform the President of Sri Lanka to provide him with additional security as requested, as early as possible, and to continue to investigate his complaints.
State party	**SRI LANKA**
Case	Sarma, Jegatheeswara, 950/2000
Views adopted on	16 July 2003
Issues and violations found	Military detention, mistreatment and disappearance - articles 7 and 9.
Remedy recommended	The State party is under an obligation to provide the author and his family with an effective remedy, including a thorough and effective investigation into the disappearance and fate of the author's son, his immediate release if he is still alive, adequate information resulting from its investigation, and adequate compensation for the violations suffered by the author's son, the author and his family. The State party is also

under an obligation to expedite the current criminal proceedings and ensure the prompt trial of all persons responsible for the abduction of the author's son under section 356 of the Sri Lankan Penal Code and to bring to justice any other person who has been implicated in the disappearance.

Due date for State party response	4 November 2003
Date of reply	2 February 2005
State party response	The State party submits that the criminal proceedings against the accused charged for the abduction of the author's son are pending before the High Court of Trincomalee. The Attorney-General has, on behalf of the Government of Sri Lanka, informed the court to expedite the trial. The Government will thereafter refer the case to the Human Rights Commission of Sri Lanka to make recommendations on the question of payment of compensation including the determination of the quantum of such compensation.
Author's comments	On 11 April 2005, counsel provided comments on the State party's submission. He stated that the State party has failed to give effect to the decision as it has: failed to investigate all those responsible even though their particulars were made available by the author to the State party; failed to trace the interview the potential witnesses whose names and addresses were disclosed to the State party and whose evidence could cast light as to the whereabouts of the author's son, and failed to cite them as witnesses for the prosecution in the case of Corporal Sarath; failed to pay compensation, deferring consideration of the payment of compensation to the conclusion of the said trial, which, in light of experience, is likely to lead to further inordinate delays if it does not lead to the question of compensation being deferred indefinitely. The case against Corporal Sarath has been pending in the High Court of Trincomalee for the last three years. There is noting on the case brief to indicate that any request to expedite the trial has been received by the Court, still less acted upon.
State party	**SRI LANKA**
Case	Nallaratnam Singarasa, 1033/2001
Views adopted on	21 July 2004
Issues and violations found	Unfair trial, mistreatment, no proper appeal - articles 2, paragraph 3, 7, 14, paragraph 1, 14, paragraph 2, 14, paragraph 3 (c), 4, paragraph 3 (g).

Remedy recommended	In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective and appropriate remedy, including release or retrial and compensation. The State party is under an obligation to avoid similar violations in the future and should ensure that the impugned sections of the PTA are made compatible with the provisions of the Covenant.
Due date for State party response	4 November 2004
Date of reply	2 February 2005
State party response	As a general observation the State party expresses its concern that several recent decisions made by the Committee have been taken without paying due attention to the Constitutional provisions and the prevailing legal regime in Sri Lanka. It submits that in order to maintain the confidence of Governments it is imperative that the Committee give due weight to these factors and ensure that the process to which the State party has made a commitment in good faith is not abused by interested parties for their own needs. The State party refers to the reference to the Prevention of Terrorism Act (PTA) in the Views (communication No. 1033/2001 and No. 950/2000) and wishes to clarify that the PTA was introduced only as temporary legislation due to the extraordinary security situation that prevailed in the country, with a view to preventing acts of terrorism and other unlawful activities, which caused tremendous destruction to human life and property in the last two decades in the State party. Under the provisions of the PTA, if a suspect is detained under a detention order section 9 (1), such a person should be produced before a Magistrate not later than 72 hours from the time of the arrest. However, a person can only be detained in police remand custody for a maximum period of 18 months, during which investigations relating to the suspect must be concluded. After the signing of the Memorandum of Understanding (MOU), between the government of Sri Lanka and the LTTE in February 2002, all criminal investigations or arrests are carried out under the Criminal Procedure, and not under the PTA. Since the signing of the MOU, approximately 1,000 indictments of the PTA detainees have been withdrawn. In addition, 338 persons who were in detention pending charges were discharged at the end of 2003. As of January 2004, there are 62 cases pending in the Special High Court, established with a view to expediting such trials. These cases were filed before the MOU was signed and were not withdrawn by the Attorney-General due to the seriousness of the offence.

	As to the Committee's request with respect to this case, the State party submits that the Constitution of Sri Lanka and the prevailing legal regime do not provide for release, retrial or the payment of compensation to a convicted person, after his conviction is affirmed by the highest appellate court, the Supreme Court. To take such steps would be contrary to the Constitution and be tantamount to an interference of the independence of the judiciary. However, with a view to complying with the Views, the legal authorities "could" recommend to the President, the exercise of the sovereign power for the grant of a pardon by virtue of powers vested in her under article 34 of the Constitution. Such a grant of pardon is a matter of unfettered sovereign discretion of the President. In exercising the above power, the Constitution only empowers the President to grant a pardon or respite of the sentence but does not empower the President to revoke a conviction passed by a competent court.
State party	**TAJIKISTAN**
Case	Saidova, 964/2001
Views adopted on	8 July 2004
Issues and violations found	Death penalty, unfair trial and torture - articles 6, 7, 10, paragraph 1, 14, paragraphs 1, 2, 3 (b), (d), and 5.
Remedy recommended	Under article 2, paragraph 3 (a), of the Covenant, the author is entitled to an effective remedy, including compensation.
Due date for State party response	20 October 2004
Date of reply	29 September 2004
State party response	The State party informed the Committee that Mr. Saidov's execution had been carried out in the spring of 2001. The Ministry of Foreign Affairs of Tajikistan claim not to have received any information on the registration of this case or subsequent information from the Secretariat between 2001 and 2003, and no record was found in the Ministry's Registry or Archives in this respect.
Further action taken/required	In October 2004 the Secretariat met with a Tajik delegation in the context of individual complaints, at which the issue of follow-up to Views was considered. The delegation confirmed that up to 2002, information sent to the Mission in New York was not forwarded to its capital. From now on all information with respect to individual complaints will be sent to the Permanent Representative in New York, the Foreign Ministry and the OSCE in Tashkent.

During the eighty-third session (29 March 2005) the Rapporteur met with a member of the Permanent Mission of Tajikistan to the United Nations. The Rapporteur explained his mandate and provided the representative with copies of the Views adopted by the Committee in the following communications: 1096/2002 (Kurbanov), 964/2001 (Saidov) and 1117/2002 (Khomidov). The Rapporteur expressed concern about the lack of information or unsatisfactory replies received from the State party regarding the implementation of the Committee's recommendations on these cases. He suggested that the State party provide information about the measures taken to comply with such recommendations during the examination of the Tajikistan periodic report, in July 2005.

The State representative gave the Rapporteur assurances that he would inform his authorities in the capital about the Rapporteur's request.

On 21 April 2005, the State party forwarded information on the following communications: 1096/2002 (Kurbanov), 964/2001 (Saidov) and 1117/2002 (Khomidov), in which it reiterated information previously provided.

State party	**TAJIKISTAN**
Case	Khalilov, 973/2001
Views adopted on	30 March 2005
Issues and violations found	The victim was tortured to force him to confess guilt. His father was beaten and tortured in front of him and, as a consequence, died in the police premises; the judgement by which he was sentenced to death could not be appealed. The sentence of death was passed and carried out, in violation of the right to a fair trial. The authorities' failure to notify the author of the execution of the victim amounted to a violation of article 7. The Committee concluded that articles 6, paragraph 1, 7; 10, paragraph 1; 14, paragraphs 2, 3 (g) and 5 had been violated.
Remedy recommended	Effective remedy, including information on the location where the victim is buried and compensation.
Due date for State party response	30 June 2005
Date of reply	Note verbale dated 24 May 2005, received on 11 July 2005
State party response	The Ministry of Foreign Affairs received neither the Committee's request not to execute the victim nor the subsequent notes from the Committee asking the State party to provide comments. The State party claims that it had no information on the fact that the communication was being examined by the Committee.

State party	**TAJIKISTAN**
Case	Kurbanov, 1096/2002
Views adopted on	6 November 2003
Issues and violations found	Arbitrary arrest and detention, torture, unfair trial, no/inadequate legal representation, no right to appeal, no interpretation, inhuman conditions, death sentence following unfair trial - articles 6, 7, 9, paragraph 2, and 3, 10, 14, paragraphs 1, and 3 (a) and (g).
Remedy recommended	Compensation and a new trial before an ordinary court and with all the guarantees of article 14, or, should this not be possible, release.
Due date for State party response	10 February 2003
Date of reply	29 September 2004
State party response	The State party confirmed that following the Committee's Views, the author's death sentence was commuted to a "long term" of imprisonment. Subsequently, the State party informed the Committee that this was 25 years. The State party provides a copy of the joint reply of the Office of the General Prosecutor and the Supreme Court addressed to the Deputy Prime Minister. The General Prosecutor and the Supreme Court re-examined the author's case. He was arrested on 12 May 2001 suspected of fraud and was kept in detention since 15 May 2001. According to the authorities, the case file did not contain any information that the author had been subjected to torture or ill-treatment, and he presented no complaint on this issue during the investigation or in court. The authorities concluded that his conviction of different crimes (including murders) was proved, that the judgement was grounded, and found no reason to challenge it.
Further action taken/required	During the eighty-third session (29 March 2005) the Rapporteur met with a representative of the State party. The Rapporteur explained his mandate and provided the representative with copies of the Views adopted by the Committee in the following communications: 1096/2002 (Kurbanov), 964/2001 (Saidov) and 1117/2002 (Khomidov). The Rapporteur expressed concern about the lack of information or unsatisfactory replies received from the State party regarding the implementation of the Committee's recommendations on these cases. He suggested that the State party provide information about the measures taken to comply with such recommendations during the examination of Tajikistan periodic report, in July 2005. The State representative gave the Rapporteur assurances that he would inform his authorities in the capital about the Rapporteur's request.

On 21 April 2005, the State party forwarded information on the following communications: 1096/2002 (Kurbanov), 964/2001 (Saidov) and 1117/2002 (Khomidov), in which it reiterated information previously provided.

State party	**TAJIKISTAN**
Case	Khomidov, 1117/2002
Views adopted on	29 July 2004
Issues and violations found	Death penalty, unfair trial, torture, arbitrary detention - articles 6, 7, 9, paragraph 1, 2, 14, paragraphs 1, 3 (b), (e), (g).
Remedy recommended	In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Khomidov with an effective remedy, entailing commutation of his sentence to death, a compensation, and a new trial with all the guarantees of article 14, or, should this not be possible, release.
Due date for State party response	3 November 2004
Date of reply	13 December 2004 (received March 2005)
State party response	The State party provides copies of the replies of the Office of the General Prosecutor and the Supreme Court. The General Prosecutor and the Supreme Court considered whether the author's case should be re-examined following the Committee's finding of violations of the Covenant. Having made a substantial examination of the merits of the case, the Supreme Court considered that the conviction was grounded and lawful and found no reason for a re-examination of the case. The Prosecutor came to the same conclusion. However, in light of the moratorium on the death penalty, dated 15 June 2004, the author's death sentence was commuted to 25 years of imprisonment, the first five in prison and the rest in a "prison colony". On 21 April 2005, the State party forwarded information on the following communications: 1096/2002 (Kurbanov), 964/2001 (Saidov) and 1117/2002 (Khomidov), in which it reiterated information previously provided.
Further action taken/required	During the eighty-third session (29 March 2005) the Rapporteur met with a representative of the State party. The Rapporteur explained his mandate and provided the representative with copies of the Views adopted by the Committee in the following communications: 1096/2002 (Kurbanov), 964/2001 (Saidov) and 1117/2002 (Khomidov). The Rapporteur expressed concern about the lack of information or unsatisfactory replies received from the State party regarding the implementation of the Committee's recommendations on these cases.

He suggested that the State party provide information about the measures taken to comply with such recommendations during the examination of Tajikistan periodic report, in July 2005.

The State representative gave the Rapporteur assurances that he would inform his authorities in the capital about the Rapporteur's request.

State party	**UKRAINE**
Case	A. Aliev, 781/1997
Views adopted on	7 August 2003
Issues and violations found	Unfair trial, no right to legal representation - articles 14, paragraphs 1 and 3 (d).
Remedy recommended	Since the author was not duly represented by a lawyer during the first months of his arrest and during part of his trial, even though he risked being sentenced to death, consideration should be given to his early release.
Due date for State party response	1 December 2003
Date of State party response	17 August 2004
State party response	According to the State party, the author's case was examined by the General Prosecutor, who established that Aliev was properly convicted as charged on 11 April 1997 and sentenced to death. On 17 July 1997, the Supreme Court confirmed the conviction and sentence. The author's claim that he was denied access to counsel for a five month period during the investigation are concocted. He was arrested on 28 August 1996 and was interrogated in the presence of his lawyer. The criminal investigation into the author's case was conducted with the participation of his lawyer, who was involved at all relevant stages, including during the trial. After the conviction Aliev and his lawyer appealed to the Supreme Court. It claims that the author was advised of the Supreme Court hearing but for unknown reasons he failed to appear. The case file materials refute the claims by Aliev that he was subjected to "unlawful means of investigation", or that any violations of criminal procedure law took place. There is no evidence to suggest otherwise, and Aliev made no such complaints at the time. It was only at his appeal that Aliev started to make claims about having been forced by the police to make a confession. In accordance with the amnesty on the death penalty in force, Aliev's sentence was commuted to life imprisonment. In the circumstances, the State party claims that there is no basis to alter the findings of the relevant judicial bodies.

State party	**URUGUAY**
Case	Viana, 110/1981
Views adopted on	31 March 1983
Issues and violations found	Inhuman treatment, no legal counsel of own choosing and trial with undue delay - articles 7, 10, paragraph 1, 14, paragraph 3 (b), (c), (d).
Remedy recommended	Provision of effective remedies and, in particular, with compensation for physical and mental injury and suffering caused to him by the inhuman treatment to which he was subjected.
State party response	On 31 May 2000, the State party had informed the Committee that it had decided to provide the author with compensation of US$ 120,000.
Author's comments	By letter of 4 November 2004, the author alleges that the State party has not complied with the Committee's Views.

State party	**UZBEKISTAN**
Case	Navarov, 911/2000
Views adopted on	6 July 2004
Issues and violations found	"Framing" for criminal offence, denial of legal advice and family access, discrimination due to religious belief - articles 9, paragraph 3, and 14.
Remedy recommended	An appropriate remedy, including compensation and the author's immediate release.
Due date for State party response	28 October 2004
Date of reply	27 October 2004
State party response	The State party provided a detailed response to the Committee's Views. It will be recalled that the State party had failed to provide any information on the admissibility and merits of the case, prior to consideration by the Committee. In its reply the State party set out the facts. It submits that, contrary to the author's claim, the car was only searched once on 26 December 1997 in the company of witnesses who gave evidence to that effect at the District Court hearing. The author was detained on 28 December, on the basis of his arrest and the charges against him and released on 31 December. Thus, according to the State party, he was not illegally detained for five days.

On 29 December, he was interrogated in the presence of his lawyer who participated in the proceedings thereafter. As to the author's request for the appointment of an expert to determine the geographical origin of the hemp, the State party submits that this was rejected by the Court as it would not have made any significant contribution to the criminal case. A forensic chemical expert on 27 December had confirmed that the substances were narcotic drugs. Finally, the State party submits that under the Amnesty Act under the Decree of the President of the Republic of Uzbekistan on 3 December 2002, the author was released from imprisonment on 21 January 2003. As he is a citizen of Kyrgystan, he was accompanied to the border and left the jurisdiction of Uzbekistan. In the State party's view, the decision of the domestic courts in this case was correct.

State party	**UZBEKISTAN**
Case	Arutyunyan, 917/2000
Views adopted on	29 March 2004
Issues and violations found	Death penalty - unfair trial and mistreatment - articles 10, paragraph 1, and 14, paragraph 3 (d).
Remedy recommended	Provide Mr. Arutyunyan with an effective remedy, which could include consideration of a further reduction of his sentence and compensation. The State party is also under an obligation to prevent similar violations in the future.
Due date for State party response	12 July 2004
Date of reply	31 December 2004
State party response	The State party provided a detailed response to the Committee's Views. It will be recalled that the State party had failed to provide any information on the admissibility and merits of the case, prior to consideration by the Committee. The only information provided by the State party was that the author's death sentence was commuted to 15 years' imprisonment. In its reply, the State party denies the allegations and findings against it. It states that the author was represented by counsel from 7 June 1999 throughout the preliminary investigation and trial. It adds that he confessed to the crime in a statement, and made no mention in court that he had been ill treated or put under pressure to sign a confession. From 27 September 1999 to 5 October 1999, the court hearing was suspended to allow his lawyer to study the case materials. On 20 December 1999, the author's case

was examined by the Appellate Court of the Supreme Court, at which author's counsel made no mention of difficulties in preparing the author's defence. None of the allegations made by the author are reflected in the case materials. The State party states that it is groundless to say that the death sentence was commuted to cover mistakes in the handling of the case, and that following several Amnesty Decrees the initial term of imprisonment of 20 years has been reduced to 6 years, 10 months and 11 days. In fact, the author's imprisonment will be terminated on 15 April 2006. Between 6 December 2001 and 20 January 2004, the author was transferred from prison to a "colony" with a "strict regime", and from 20 January 2004 to a colony with a "general regime".

State party	**UZBEKISTAN**
Case	Hudoyberganova, 931/2000
Views adopted on	5 November 2004
Issues and violations found	Infringement of expression of religious belief (prohibited to wear headscarf) - article 18, paragraph 2.
Remedy recommended	In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Ms. Hudoyberganova with an effective remedy.
Due date for State party response	10 March 2005
Date of reply	26 April 2005
State party response	According to the State party, the individual opinions of Mr. Solari Yrigoyen, Sir Nigel Rodley and Mrs. Wedgwood, demonstrate that the author had failed to substantiate her claims on her exclusion from the Tashkent State Eastern Languages Institute, and also that her claims on the wearing of the hijab were contradictory. The State party points out that the Institute is a secular education institution and as such has its internal regulations, compulsory for both staff and students. Ms. Hudayberganova was aware of the internal regulations' provisions, but she refused to comply with them. Notwithstanding the warnings of the Institute administration, the author refused to comply with the internal regulations and systematically entered into conflict with professors. In particular, she accused a teacher of having received bribes.

It is stated that the author's allegations that she was subjected to unlawful pressure by the administration do not reflect the reality and were groundless. According to the State party, Ms. Hudayberganova was excluded from the Institute following numerous warnings, not because of her religious beliefs, but because of her rude and immoral attitude vis-à-vis a professor and the violation of the Institute's internal regulations.

The State party also points out that Hudayberganova's disrespectful attitude towards her professors and the conflictual character of her behaviour, created an "unfavourable" studying and moral atmosphere which had affected the whole educational process.

According to the State party, in its Views, the Committee did not take into account the author's conflictual behaviour but had drawn its attention to the wearing of a "hijab". It is stated that the "hijab" the author wore completely covered her face, except her eyes, which created certain difficulties in her contacts with professors during courses.

As to the author's allegation that her exclusion was based on the banning of the "hijab" because of her religious beliefs, the State party contends that Islam does not prescribe the wearing of specific clothes, which was confirmed also by a specialist from the Committee on Religions to the Committee of Ministers of Uzbekistan.

According to the State party, the individual opinion of Mr. Solari Yrigoyen reflects in the best manner the substance of the case, whose motivations were "more complicated" than the ones presented and examined by the Committee.

Finally, the State party disagrees with the conclusion in Sir Nigel's individual opinion in relation to the unclear reasons, for the State party, to install the "limitations in the author's respect". According to the State party, the limitations of the internal regulations in question applied not only to the author but to all staff and students, without exception.

State party	**UZBEKISTAN**
Case	Arutyuniantz, 971/2001
Views adopted on	30 March 2005
Issues and violations found	The victim's trial did not respect the principle of presumption of innocence, in violation of article 14, paragraph 2.

Remedy recommended	An appropriate remedy, including compensation and either his retrial or his release.
Due date for State party response	31 June 2005
Date of reply	1 July 2005
State party response	The State party finds the conclusions of the Committee "inadmissible", and refers to a range of evidence which proved the author's guilt in the murders for which he was convicted. The State party further states that the courts did establish who killed the victims, i.e. both Mr. Arutyuniantz and his accomplice. According to the court, they had in any event both planned the murders. The State party considers its courts' decisions to be correct and that they did not entail any violations of the presumption of innocence.
